TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 46

J. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

MOTOR BOAT SALES, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1941
CERTIORARI GRANTED MAY 12, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. —

E. V. PARKER, DEPUTY COMMISSIONER FOR THE FIFTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

VS.

MOTOR BOAT SALES, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Eastern District of Virginia	1	1
Caption [omitted in printing]	1	1
Bill of complaint	1	1
Exhibit A—Compensation order, Jan. 17, 1940	9	7
Motion to dismiss	13	9
Order filing answer	14	10
Answer	14	11
Defendant's exhibit A filed at Court hearing:		
Statement of evidence before Deputy Commissioner	17	12
Caption and appearances	17	12
Statement of defense	18	12
Stipulation re proof of death	19	13
Evidence on behalf of claimant:		
Jessie Armistead	19	14
Exhibit 1—Marriage license	21	15
George W. Todd	27	20
George Purcell Armistead, Sr	35	25
Phil Goode	36	26
Welford Earl Lloyd	39	27
Defendants exhibit 1—Weekly schedule for George P. Armistead, Jr	43	30

303223—41——1

	Original	Print
Record from D. C. U. S., Eastern District of Virginia—Con.		
Defendant's exhibit A—Continued.		
Statement of evidence—Continued.		
Evidence on behalf of defendant.		
Randolph Hobbs	49	34
Welford Earl Lloyd	57	39
William Crown	59	41
John Samuel Cooper	64	44
S. King Fulton	71	49
Reporter's certificate [omitted in printing]	76	52
Claimant's exhibit 1—Coroner's certificate	78	52
Memorandum opinion, Pollard, J	81	54
Motion of Plaintiff for leave to reargue case, etc	84	56
Order refusing motion to reargue case, etc	86	57
Final Decree	87	58
Petition for Appeal	90	60
Order allowing Appeal	93	62
Assignments of Error	93	62
Clerk's Memorandum as to Appeal Bond and Citation	95	64
Stipulation of Proctors as to omission of certain pleadings in the Record on Appeal	96	64
Stipulation of Proctors as to what shall constitute the Record on Appeal	98	66
Clerk's Certificate [omitted in printing]	100	67
Proceedings in the U. S. C. C. A., Fourth Circuit	101	67
Docket entries	101	67
Opinion, Dobie, J	103	68
Decree	118	78
Recital as to issuance of mandate	118	78
Order authorizing clerk to use original transcripts of records	119	79
Clerk's certificate [omitted in printing]	120	79
Order allowing certiorari		80

1 [Caption omitted.]

In United States District Court, Eastern District of Virginia

No. 1507—Miscellaneous

MOTOR BOAT SALES, INCORPORATED, PLAINTIFF

vs.

E. V. PARKER, DEPUTY COMMISSIONER, FIFTH COMPENSATION DISTRICT, DEFENDANT

Bill of complaint

(Filed February 9, 1940)

To the honorable ROBERT N. POLLARD, *Judge of the District Court of the United States for the Eastern District of Virginia:*

(1) The Motor Boat Sales, Incorporated, a corporation under the laws of the State of Virginia and licensed to do business therein, brings you this, its bill of complaint against E. V. Parker, Deputy Commissioner for the Fifth Compensation District of the United States Employees' Compensation Commission, he being a resident of the City of Washington, in the District of Columbia,
with his offices as said Deputy Commissioner in the City
2 of Norfolk, in the Post Office Building of said City, State of Virginia;

(2) This bill of complaint in equity is filed by the plaintiff for the purpose of reviewing and setting aside an order for compensation made by E. V. Parker, Deputy Commissioner for the Fifth Compensation District of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act as enacted by the Congress of the United States on March 4, 1927, being Section 901 et seq., Title 33, of the Code of Laws of the United States, which said Compensation order was made and entered by the said Deputy Commissioner on January 17, 1940, a copy thereof being attached hereto, made a part hereof and marked Exhibit A;

(3) Plaintiff, the Corporation named in said compensation order as employer, was during the time stated engaged exclusively in the business of buying and selling at retail maritime supplies of all kinds, including the sale of small boats ready for delivery and to go not larger than the yacht class, and outboard gasoline motors and parts from its retail store located at 3 West Grace Street, in the City of Richmond, Virginia, but it was not engaged in the business of servicing boats or doing any installation, repair, or

other work on navigable waters; that the defendant, Jessie B. Armistead, is the purported widow of George P. Armistead, Jr., deceased employee, and the mother of three minor children, Dorothy Marian Armistead, an admittedly illegitimate child, born March 24, 1933, before she was married to George P. Armistead, Jr.; George Percell Armistead III, born October 3, 1934; and William Berkley Armistead, born March 26, 1938;

(4) That George P. Armistead, Jr., claimant's decedent, was employed by the plaintiff as "a janitor and handy man" to do the work of opening plaintiff's said store in the mornings, cleaning up the store and the several apartments over it, washing windows, cleaning outboard motors, buffing tanks, driving automobile, and making deliveries on land, with instructions not to work or go upon navigable waters at any time; that on August 8, 1938, the
3 date he was drowned, he was directed by another employee to load two outboard gasoline motors from plaintiff's store into its automobile and to transport them from the store to the James River, his only duties being to assist in loading these two outboard motors from the store into the automobile, driving the automobile from there down to the James River, a distance of about two miles, and in lifting the two outboard motors out of the automobile and delivering them to the mechanic, another employee who was sent and directed to severally attach the outboard motors to a small boat owned by a Mr. Crown, a third party, for the purpose of allowing him to test the outboard motors out on his small boat on James River; that the outboard motors were thereafter separately and successively attached to the end of the Crown boat, which was up on the bank of the river at the times they were so attached, and the boat was thereafter shoved into the river; that thereupon George P. Armistead, Jr., the deceased employee, after he had performed the work he had been directed to do, in violation of his instructions not to go upon navigable waters while working for the plaintiff, of his own will and accord got into the Crown boat, without directions to do so from anyone, and of his own volition, and was riding therein for his own enjoyment and pleasure when the boat accidentally capsized without any fault or negligence of the plaintiff or the owner of the boat, and the said Armistead, Jr., was drowned at a time when he was not engaged in performing any work he had been employed or directed to do by the plaintiff, or otherwise;

(5) That thereafter, on October 14, 1938, the defendant, Jessie Booker Armistead, as widow of the said George P. Armistead, Jr., filed a claim with the Deputy Commissioner for the Fifth Compensation District, claiming compensation under the Longshore-

men's and Harbor Workers' Act for herself and on behalf of the above-named three minor children; that the said Deputy Commissioner assumed jurisdiction thereof; that the plaintiff, employer, under date of October 14, 1938, gave notice to the Deputy Commissioner that the claim would be controverted and all defenses made under the said Longshoremen's and Harbor Workers'

Compensation Act that could be lawfully made; that the
4 Act itself did not apply to or cover the plaintiff, Motor Boat Sales, Incorporated, employer, or deceased employee; that the death of the employee, George P. Armistead, Jr., did not result from injuries arising out of and in the course of his employment, and that he was not an employee in "maritime employment" or within the coverage of the Act; that the plaintiff, the employer, was not engaged in maritime business; and that the Act, if it attempted to make the plaintiff, employer, liable under these circumstances, was unconstitutional; that the Deputy Commissioner, on October 13, 1939, took testimony of certain witnesses produced before him, and, thereafter on January 17, 1940, made findings of facts and law and an award to claimant, Jessie Booker Armistead, for herself and for the three minor children, all of which more fully appears from Exhibit A attached hereto, reference to which is hereby made; that the compensation award was as follows:

"That the employer, Motor Boat Sales, Incorporated, shall pay to the claimant death benefits as follows: For herself, as widow, $4.725 per week, and in addition $1.35 per week each, on account of the children, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead. Accrued death benefits covering the period August 8, 1939, to January 14, 1940, amounting to $658.13, shall be paid forthwith. Thereafter, payments shall be made biweekly in installments of $17.55, to continue until there is a change in conditions. The employer shall also pay $190.00 to George P. Armistead, Sr., as reimbursement for funeral and burial expenses paid by him and $250.00 fee for plaintiff's counsel:"

(6) That the claim for compensation, the testimony taken before and submitted to the defendant, Deputy Commissioner, and the award, are all in his custody, and it is necessary for the Court to have possession of all of said records in order to determine whether or not the claim falls within the coverage of the Longsho men's and Harbor Workers' Act, Title 33, U. S. C. A., Sectio 01 et seq., and to determine whether or not the Deputy Commissioner had jurisdiction, and his order and award are

without evidence to support them, and are in accordance with law;

5 (7) That the claim of claimant for compensation on account of the death of George P. Armistead, Jr., does not fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act; that E. V. Parker, Deputy Commissioner, was without jurisdiction to entertain such claim, and that the order and award made by him are without evidence to support them and are not in accordance with law and are erroneous for the reasons that:

The death of George P. Armistead, Jr., claimant's decedent, was not caused by and did not result in the trade, business, occupation, or profession of the employer, the plaintiff; that the employment of George P. Armistead, Jr., claimant's decedent, was not maritime, and that he was not employed in maritime employment, in whole or in part, upon the navigable waters of the United States; that his death did not occur in the usual course of his employment or under circumstances which include compensation for his death under the Longshoremen's and Harbor Workers' Act, Title 33, U. S. C. A., Sections 901, et seq.; that he was not employed as a longshoreman or harbor worker; that he was not actually engaged in any employment in the usual course of the trade, business, occupation, or profession of the plaintiff, or performing any work he had been employed or directed to do; that he had no employment which required him at the time he was drowned to navigate, be on, or ride in the vessel, a small boat owned and belonging to a Mr. Crown, a third party, on navigable waters, or to do maritime work thereon, and that in and while he was riding in said small boat the relationship of master and servant did not exist; and that he was riding in the boat in violation of his employment and instructions of the plaintiff not to go or work upon navigable waters while engaged in and working for the plaintiff; that his death resulted from the voluntary act of claimant's decedent in riding of his own volition and accord and for his own purpose and pleasure and outside and beyond his employment in a small vessel owned by a third party; that the

Congress of the United States may not impose liability on

6 an employer to pay compensation for the death of an employee except where by virtue of the existence of employment on navigable waters and in the performance of a duty resulting from the relationship of master and servant; that the assumption of jurisdiction by the Deputy Commissioner and his findings of fact and law and construction of the Act, Title 33, U. S. C. A., 901, et seq., to the contrary render the Longshoremen's and Harbor Workers' Act unconstitutional, especially as

to Article 3 and the 5th and 14th Amendments to the Constitution of the United States; that the determination of the existence of such jurisdictional prerequisite may not under law and the Constitution of the United States be left to the decision of administrative tribunals, but is lodged in and must be determined by a Court: that the Longshoremen's and Harbor Workers' Compensation Act provides, among other things, that:

"SEC. This Act shall not apply to the injury or death of * * *. (4) An employee engaged in any employment that is casual and not in the usual course of the trade, business, occupation, or profession of the employer" * * *;

that George P. Armistead, Jr., the claimant's decedent's, in going into and upon and riding in the small boat and on navigable waters, did so casually, and was not in the usual course of his employment and of the trade or business of the plaintiff, and that the employment of claimant's decedent, George P. Armistead, Jr., was local, and that he was not in said boat or on navigable waters in pursuit of maritime employment or in the performance of any work he was or had been employed, directed, or paid to do.

(8) Plaintiff herein will be irreparably damaged if an interlocutory injunction is not granted and the payment of compensation under said award insofar as the plantiff is concerned stayed pending the final hearing of this cause; that the plaintiff herein has no adequate remedy of law and has no means of redress of the wrongs of which he complains except through injunctive proceedings to set aside the award as made and rendered against the plaintiff, and this Court should, therefore, grant, upon proper notice, an interlocutory injunction staying the payment or payments awarded by said Deputy Commissioner until the final determination of this cause.

Wherefore plaintiff prays:

(a) That this Court take jurisdiction of the subject matter of this suit;

(b) That a mandatory injunction be granted by and issue from this Court to the defendant, E. V. Parker, Deputy Commissioner of the Fifth Compensation District of the United States, commanding him within a certain number of days from receipt thereof, to deliver to this Court or its Clerk, a transcript of the record in re Jessie Booker Armistead, widow of George P. Armistead, Jr., claimant, against Motor Boat Sales, Incorporated, employer, being case No. 825-1; that upon application of the plaintiff an interlocutory injunction be issued staying all payments ordered by the said Deputy Commissioner in said compensation order and award

of compensation hereinabove described, pending final determination of this cause;

(c) That upon final hearing a permanent injunction be granted and issued, permanently enjoining and staying all payments ordered by said Deputy Commissioner to be paid in said compensation order and award of compensation;

(d) That upon final hearing it be decreed by this Court that the said compensation order and award of compensation, made by said Deputy Commissioner, was without evidence to support it or contrary to the character of the evidence, and was not in accordance with law, and was in violation of the Constitution of the United States, and that the said Deputy Commissioner was without jurisdiction to entertain said claim or make said award, and that same be vacated, set aside, and held to be of no force, virtue, or effect;

(e) That this Court issue its writ of subpoena directed to said defendant, demanding him upon a certain day and under a certain penalty to be therein specified, to appear before this Court and to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the matters and things herein set forth and complained of and to stand, abide by
8 and perform all orders and decrees of this Court which may be entered herein; and that the plaintiff herein may have such other and further relief as he may be entitled to in equity and good conscience.

And your complainant will ever pray.

This suit is brought pursuant to an order of the Board of Directors of said Motor Boat Sales, Incorporated, dated Feb. 6, 1940.

(Sgd.) MOTOR BOAT SALES, INCORPORATED.
By (Sgd.) S. KING FULTON, *Its President.*

(Sgd.) M. J. FULTON,
Counsel of Record for Plaintiff,
Motor Boat Sales, Incorporated,
520 Mutual Building, Richmond, Virginia.

[*Duly sworn to by S. King Fulton; jurat omitted in printing.*]

I, the undersigned M. J. Fulton, counsel of record in the above entitled cause, hereby certify that the above affidavit and application made by Motor Boat Sales, Incorporated, are made in good faith by him.

(Sgd.) M. J. FULTON,
Counsel of Record for Plaintiff,
Motor Boat Sales, Incorporated.

9 *Exhibit A to bill of complaint*

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

FIFTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

JESSIE BOOKER ARMISTEAD, WIDOW OF GEORGE P. ARMISTEAD, JR. (DECEASED), CLAIMANT

vs.

MOTOR BOAT SALES, INC., EMPLOYER

Compensation Order—Award of Compensation—Case No. 825–1

No insurance

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 8th day of August 1938 George P. Armistead, Jr., was in the employ of the employer above named at Richmond, in the State of Virginia, in the Fifth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was uninsured; that on said day George P. Armistead, Jr., while performing service for the employer upon the navigable waters of the United States, sustained personal injury, resulting in his death, while he was employed as a janitor and handyman; that on said day Armistead had been ordered by his superiors to assist a mechanic, a fellow employee, in carrying two outboard motors, the property of the company, to the river and attach them to the stern of a motorboat for the purpose of testing the same and interesting the owners of the motorboat in the sale of one of the said motors; that upon reaching the river Armistead assisted the mechanic in attaching one of the motors to the boat and the vessel made a trip about the harbor,

10 the two owners of the vessel, the mechanic, and Armistead making the trip, the boat being driven by the mechanic, Cooper; that Armistead then assisted in taking off the first

motor and installing the second one, after which he entered the bow of the boat and, with Cooper driving, another trip about the harbor was made; that the two owners did not make this trip, having to leave because of other engagements; that while the vessel was being driven on the second trip it struck an obstruction, was overturned, and Armistead was drowned;

Armistead was to assist the mechanic, Cooper, who was his superior. The latter gave no instructions as to Armistead accompanying or not accompanying him on the testing trips; however, the services of Armistead were helpful to the mechanic, in that he acted as a look-out man in the bow. Cooper tacitly approved and acquiesced in the aid given him by the inferior employee, and such aid was in furtherance of the employer's interests. Armistead's work while in the boat was not for the purpose of pleasure, and he acted as would be expected of a colored helper under the circumstances;

The employer's business was the selling of motor cruisers, sailboats, motors for outboard boats, and the sale of boat and maritime supplies. On occasions its employees (mechanics) went aboard vessels, serviced them, and tested out ignition on trips on navigable waters;

That the death of George P. Armistead, Jr., by drowning, on August 8, 1938, arose out of and in the course of the employment; that his death occurred upon navigable waters; and that at the time of death he was engaged in maritime employment;

That the average annual earnings of George P. Armistead, Jr., at the time of his death amounted to the sum of $702.00;

That Jessie Booker Armistead is the surviving wife of George P. Armistead, Jr., and was living with him at the time of his death; that as widow she is entitled to death benefits at the rate of $4.725 per week; that Dorothy Marian Armistead, born March 24, 1933, George Percel Armistead, III, born October 3, 1934, and William Berkley Armistead, born March 26, 1938, are the
11 surviving children of George P. Armistead, Jr., Dorothy Marian Armistead being an acknowledged illegitimate child, and each is entitled to death benefits at the rate of $1.35 per week; that the accrued death benefits for the period August 8, 1938, to January 14, 1940, 75 weeks, at $8.775 per week, amount to $658.13;

That funeral and burial expenses were incurred in the amount of $190.00, and that said funeral bill was paid in full by George P. Armistead, Sr.;

Upon the foregoing facts the Deputy Commissioner makes the following award:

That the employer, Motor Boat Sales, Inc., shall pay to the claimant death benefits as follows: For herself, as widow, $4.725 per week, and in addition $1.35 per week each, on account of the children, Dorothy Marian Armistead, George Percell Armistead, III, and William Berkley Armistead. Accrued death benefits covering the period August 8, 1938, to January 14, 1940, amounting to $658.13, shall be paid forthwith. Thereafter, payments shall be made biweekly in installments of $17.55, to continue until there is a change in conditions. The employer shall also pay $190.00 to George P. Armistead, Sr., as reimbursement for funeral and burial expenses paid by him.

An attorney's fee for services rendered is approved in favor of Messrs. Parrish, Butcher & Parrish in the sum of $250.00, which fee shall be a lien upon this award and discharged by deduction from the accrued compensation.

Given under my hand at Norfolk, Virginia, this 17th day of January 1940.

(Signed) E. V. PARKER,
Deputy Commissioner,
Fifth Compensation District.

12 PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant and to the uninsured employer, at the last known address of each, as follows: Jessie Booker Armistead, 22 East Hill Street, Richmond, Va.; Motor Boat Sales, Inc., 3 West Grace Street, Richmond, Va.

(Signed) MARGARET W. LATHAN,
Clerk.

Mailed January 17, 1940.

Copy to—Messrs. Parrish, Butcher & Parrish, Attorneys at Law, Mutual Bldg., Richmond, Va.; Minitree Jones Fulton, Esq., Suite 520 Mutual Bldg., Richmond, Va.; George Percell Armistead, Sr., 22 East Hill St., Richmond, Va.; Dr. W. F. Bursey, Secretary, Industrial Commission of Virginia, Department of Workmen's Compensation, Richmond, Va.

13 In United States District Court

Motion to dismiss

Filed March 28, 1940

Now comes E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District, Norfolk, Virginia, defendant herein, by Sterling Hutcheson,

United States Attorney, his attorney, and moves that the bill of complaint in this proceeding be dismissed for the following reasons:

1. That the said bill and each article thereof is insufficient in law.

2. That neither the said bill nor any article therein alleges sufficient grounds upon which this Court should refuse, reverse, suspend, enjoin, or set aside the award heretofore made by the Deputy Commissioner.

3. The findings of fact of the Commissioner are conclusive and fully justify his award based thereon.

4. The findings of the Deputy Commissioner, fully supported by the evidence before him, are conclusive and should not be refused, reversed, suspended, enjoined, or set aside.

5. The findings of fact by the Deputy Commissioner, which are fully supported by the evidence before him, show that the said Deputy Commissioner had jurisdiction under the Act of Congress to hear and determine the said findings of fact, and the evidence upon which they are based show that the claim did not come within the exception of Section 3 of the Longshoremen's Act.

6. No ground for the award of an injunction and restraining order is shown in said bill.

E. V. PARKER,
Deputy Commissioner.

By (Sgd.) STERLING HUTCHESON,
Sterling Hutcheson,
United States Attorney.

By (Sgd.) H. H. HOLT, Jr.,
Asst. U. S. Attorney.

14 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Order filing answer

Entered and filed March 29, 1940

This day came E. V. Parker, Deputy Commissioner, United States Employees' Compensation, Commission, Fifth Compensation District, Norfolk, Virginia, defendant herein, by Sterling Hutcheson, United States Attorney for the Eastern District of Virginia, his attorney, and asks leave of the Court to file his answer herein without waiving any rights in his motion to dismiss heretofore filed, which leave is granted, and thereupon, said answer is duly filed.

(Sgd.) ROBT. N. POLLARD.
United States District Judge.

RICHMOND, VIRGINIA, *March 29, 1940.*

In United States District Court

Answer

Filed March 29, 1940

To the Honorable ROBERT N. POLLARD, *Judge of the Court Aforesaid:*

The respondent, E. V. Parker, Deputy Commissioner, United States Employees' Compensation, Commission, Fifth Compensation District, for his answer to the bill of complaint filed in this cause by the Motor Boat Sales Incorporated, answering, saith:

1. Respondent admits the allegations of Paragraph 1 of said bill.

2. Respondent admits that the bill of complaint is filed in this proceeding for the purposes set forth in Paragraph 2 of said bill.

3. Respondent denies that allegations of Paragraphs 3, 4, and 5 of the bill of complaint and adopts as his affirmative allegations the findings of fact of the Deputy Commissioner as set forth in the Commissioner's findings of fact and award dated January 17, 1940, referred to as Exhibit A in said bill of complaint.

4. Respondent admits the allegations of Paragraph 6 of the bill of complaint and files herewith copy of the transcript of the record of the hearing before him, together with a copy of the award of the Commissioner made in these proceedings as Exhibits A and B and asks that they be read as a part of his answer as if fully set forth herein.

5. Respondent denies the allegations of Paragraph 7 of the bill of complaint.

6. Respondent denies that the plaintiff will be irreparably damaged as contained in Paragraph 8 of said bill and denies that the plaintiff is entitled to an injunction in these proceedings.

7. As further answer to the said bill of complaint, the respondent avers that the findings of fact by the hearing Commissioner are supported by the evidence and are final and conclusive and are not subject to review by this Honorable Court; that the Longshoremen's Act is constitutional and should be liberally construed to effectuate beneficent purposes for which it was enacted; that the deceased, George P. Armistead, Jr., and Motor Boat Sales, Incorporated, were employee and employer, respectively, and subject to the provisions of the Longshoremen's and Harbor Workers' Act; and that the said deceased met his death by accident arising out of and in course of his employment upon the navigable waters of the United States while engaged in Maritime employment under

such circumstances as to entitle his dependents, as defined by the said Act, to compensation.

8. Respondent denies that the Longshoremen's and Harbor Workers' Act contains the provision referred to in Paragraph 7, Page 7, of the bill of complaint.

16 Wherefore the defendant prays that the bill of complaint be dismissed at the cost of the plaintiff.

Respectfully submitted.

E. V. PARKER,
Deputy Commissioner.
By (Sgd.) STERLING HUTCHESON,
Sterling Hutcheson,
United States Attorney.

17 *Defendant's exhibit A*

Filed March 29, 1940

United States Employees' Compensation Commission

E. V. PARKER, DEPUTY COMMISSIONER

Fifth Compensation District, Norfolk, Virginia

JESSIE ARMISTEAD, WIDOW OF GEORGE P. ARMISTEAD, JR., CLAIMANT

v.

MOTOR BOAT SALES, INCORPORATED, EMPLOYER

Case No. 825-1

Pursuant to notice, this matter was heard before E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, at Richmond, Virginia, on the 13th day of October 1939.

Appearances

Jessie Armistead, Claimant, in person. Mr. R. R. Parrish, representing the claimant. Mr. M. J. Fulton, representing the Employer.

18 The DEPUTY COMMISSIONER. This hearing, after due notice to all parties, is on the case of Jessie Armistead, widow of George P. Armistead, Jr., a former employee of the Motor Boat Sales, Incorporated, Employer, who was not insured under the Federal Act. The following report forms were submitted, in accordance with the Federal Statutes, viz:

Employer's First Report to Deputy Commissioner of Accident or Occupational Disease, Form U. S.-202, dated October 14, 1938.

Proof of Death, Form U. S.-264, dated October 20, 1938.

Notice to the Deputy Commissioner That Claim Will Be Controverted, Form U. S.-207, dated October 14, 1938.

Proof of Burial and Funeral—By The Undertaker, Form U. S.-265, dated August 30, 1938.

The Widow's Claim for Compensation, Form U. S.-262, dated August 30, 1938, and

Notices of Hearing, Form U. S.-226-B, dated September 28, 1938, and September 27, 1939.

The DEPUTY COMMISSIONER. What is the employer's defense, Mr. Fulton, if you will state it for the record?

Statement of defense

Mr. FULTON. All the defenses that can be made under the Act and under the usual issues, where the facts are controverted, and that the Act under which the claim is made, does not apply to the Defendant, Motor Boat Sales, Incorporated; that the employee, whose death is made the basis of the claim here, that his death did not result from injury arising out of and in the course of his employment; that he was not an employee within the terms of Section 3 of the Employment Act, and that we were not an employer engaged in maritime business, and that he was not an employee within maritime employment, and that the Act, if it seeks to make the employer liable, is unconstitutional.

19 The DEPUTY COMMISSIONER. The Supreme Court has held otherwise.

The DEPUTY COMMISSIONER. With respect to the average weekly wage; it is given on the Employer's Report as $13.50.

Mr. PARRISH. If your Honor please, I had expected to agree to that, but I understand the deceased put in considerable overtime.

The DEPUTY COMMISSIONER. We can make that a matter of proof. Do you want to offer evidence on that point?

Mr. PARRISH. I will call Mr. Todd on that point.

The DEPUTY COMMISSIONER. We will make it an issue.

Mr. PARRISH. Mr. Todd, will you have your books here for a year prior to his death?

Mr. S. KING FULTON. The Social Security record will be sufficient, and we will have it sent down.

Stipulation re proof of death

Mr. PARRISH. It has been stipulated that Doctor Williams' Proof of Death, on Form U. S. 264, which was put in the record by The

Deputy Commissioner, correctly shows the cause of death. Doctor Williams is present, but we thought we could prove it by stipulating the Form.

The DEPUTY COMMISSIONER. Is that agreeable?

Mr. FULTON. Yes, sir.

* * * * *

JESSIE ARMISTEAD, Claimant, witness in her own behalf, having been duly sworn, on oath testified as follows:

By the DEPUTY COMMISSIONER:

Q. Give your name and address, please.

A. No answer.

By Mr. PARRISH:

Q. You are Jessie Armistead?

A. Yes, sir.

Q. Where do you live?

A. 22 East Hill Street.

Q. You are the widow of George P. Armistead, Jr., the deceased in this case?

A. Yes, sir.

Q. How old are you, Jessie?

A. 22.

Q. When were you married to George?

A. May 26, 1934.

Mr. PARRISH. We offer in evidence certified copy of marriage license of George P. Armistead, Jr., and Jessie D. Booker, which is filed herewith as Claimant's Exhibit No. 1.

By Mr. PARRISH:

Q. How many children were born of this marriage?

A. 3.

Q. Give their names and ages.

A. Dorothy Marion: 6.

Q. When was she born?

A. March 24th.

Q. What year?

A. 1933.

Q. What are the names of the other children?

A. George Purcell Armistead III.

Q. When was he born?

A. October 3, 1934.

Q. What is the name of the youngest one?

A. William Berkley Armistead.

21 *Claimant's Exhibit No. 1*

No. 11–P. 66

MARRIAGE LICENSE

(Seal of Court here superimposed on an adhesive wafer.)

Virginia, City of Richmond, to wit:

To Any Person Licensed to Celebrate Marriages:

You are hereby authorized to join together in the Holy State of Matrimony, according to the rites and ceremonies of your Church or religious denomination and the laws of the Commonwealth of Virginia, George P. Armistead, Jr., and Jesse D. Booker.

Given under my hand, as Clerk of Hustings, Court of -------- County (or City), this 26 day of May 1934.

WALTER CHRISTIAN, *Clerk.*

MARRIAGE CERTIFICATE

TO BE ANNEXED TO LICENSE REQUIRED BY SECTION 5074 OF THE CODE OF VIRGINIA

Virginia: In the Clerk's Office of the Hustings Court for the City of Richmond. Date of Marriage, May 26, 1934. Place of Marriage, Richmond, Va.

(Full name of parties)

George P. Armistead and Jessie D. Baker. Age of Husband, 21 years; Condition (single, widowed, or divorced), Single. Age of Wife, 19 years; Condition, (single, widowed, or divorced), Single. Race (white, colored, or otherwise) of Husband, Colored; of Wife, Colored. Husband's Place of Birth, Richmond, Va.

(Present)

Mailing Address, 22 E. Hill St. Wife's Place of Birth, Amelia Co., Va. Mailing Address, Richmond, Va. Names of Parents Husband, George P. Armistead and Minnie Berkley.

(Full maiden name)

Wife, Junius Booker and Florence Green.

(Full maiden name)

Occupation of Husband, Teacher.

Given under my hand this 26 day of May 1934.

WALTER CHRISTIAN, *Clerk.*

CERTIFICATE OF TIME AND PLACE OF MARRIAGE

I, J. H. Binford Peay, appointed by Hustings Court of the ——— Church or religious order of that name, do certify that on the 26 day of May 1934, at Richmond, Virginia, under authority of the above License, I joined together in the Holy State of Matrimony the persons named and described therein. I qualified and gave bond according to law authorizing me to celebrate the rites of marriage in the County (or City) of Richmond, State of Virginia.

Given under my hand this 26 day of May 1934.

J. H. BINFORD PEAY.

(Person who performs ceremony sign here)

The Minister or other person celebrating a marriage is required, within thirty (30) days thereafter, to return the License and Certificate of the Clerk and his certificate of the time and place at which the marriage was celebrated to the Clerk who issued the License; failure to comply with these requirements of the law makes the Minister or other person celebrating the marriage liable to a fine of not less than ten nor more than twenty dollars for each offense (See Section 5074 of the Code of Virginia, 1919).

A Copy Teste:

THOS. R. MILLER, *Dep. Clk.*

22 Q. When was he born?

A. March 26th.

Q. What year?

A. 1938.

Q. What did you understand from George were his duties while working for the Motor Boat Sales, Jesse?

By Mr. FULTON:

Q. Just a moment. Over the testimony relating to the first child; what is the name of the first child?

A. Dorothy Marion.

Mr. FULTON. I move that that child be stricken out. That child was born before the marriage.

Mr. PARRISH. Do you want the proof of acknowledgment?

The DEPUTY COMMISSIONER. You understand the Act covers acknowledged children.

By Mr. PARRISH:

Q. Your first child, Dorothy, was born before you were married?

A. Yes, sir.

Q. Did he acknowledge that child after the marriage?

Mr. FULTON. I object.

The DEPUTY COMMISSIONER. She can answer the question.

Mr. FULTON. Exception.

A. Yes, sir.

Q. Did he consider the child as his own, just as the other two?

A. Yes, sir.

Q. Did he provide for her as the others?

A. Yes, sir.

23 Mr. FULTON. I will note an objection and exception to all that testimony.

Q. I asked you what you understood from George his duties were?

A. He had to fix and repair the motors, and, after fixing them, carry them out and test them.

Q. Do you know whether or not, during the two years he worked there, he went on the James River and Rappahannock River and did work for the Motor Boat Sales?

A. Yes, sir.

By Mr. FULTON:

Q. Do you know that of your own knowledge or is that hearsay?

A. I know's it.

By Mr. PARRISH:

Q. State whether you knew that of your own knowledge.

A. He told me.

Q. What did he tell you?

Mr. FULTON. I object to this testimony as being purely hearsay and all like testimony.

The DEPUTY COMMISSIONER. That is admissible if it is corroborated. She can answer the question.

Mr. FULTON. Exception.

A. He had to stay down on the boat, and after they sold it he had to stay down and watch it overnight.

Q. Did you see him at the boat?

A. Yes, sir.

Q. Did he come home with you on that occasion?

A. No, sir.

Q. Do you know what he did?

A. He stayed down there overnight.

24 Q. Do you know whether he was sent out of town by his employer overnight?

A. Yes, sir; by Mr. Todd.

Q. Who did George consider his boss?

A. Mr. Todd.

Mr. FULTON. The same objection to the questions as to whom he considered his boss.

Q. The record will show he is Vice President. Do you recall the night he spent on the boat?

A. It was Sunday night, but I don't remember the date.

By the DEPUTY COMMISSIONER:

Q. How long before his death?

A. I don't know.

By Mr. PARRISH:

Q. Do you remember this occasion he was sent out of town and spent the night; was it within a year of his death?

A. It was over a year.

By Mr. FULTON:

Q. Jessie, you said your first child was born March 24, 1933. How long after that was it that you and George married?

A. She was a little over a year old when we got married.

Q. Now, you say that George worked at the Motor Boat Sales, Incorporated, and that he told you that he had been sent out of town over a year before his death and spent the night; is that correct; is that what he told you?

A. He told me he spent the night out of town and he had to go for Mr. Todd.

Q. Mr. Todd was in the employ of the Motor Boat Sales and stayed at the office and store?

A. Yes, sir.

Q. You knew where the store of the Motor Boat Sales was on Grace Street; No. 3 West Grace Street?

A. Yes, sir.

Q. And isn't it a fact that George worked there as janitor and delivery boy; wasn't that his work up there?

A. No; it wasn't.

Q. Is all you know what he told you?

A. I used to go and see him there.

Q. He was cleaning up and cleaning motors and cleaning dirt, had charge of cleaning up the store and would drive the truck and automobiles and trailers from the store to where they were going?

A. He used to fix motors too.

Q. You don't say he was a mechanic up there?

A. He used to do the work of a mechanic.

Q. He used to do the work of a mechanic?

A. Yes, sir.

Q. Who was the mechanic up there?

A. Mr. Lloyd.

Q. Mr. Lloyd?

A. Yes, sir.

Q. Isn't all you saw George do about the motors was clean them up and polish them up after they had been worked on, if in there for repair, and place them in the store where they wanted them?

A. He used to fix them and put them together.

Q. All you know is that you saw him do that up there?

A. Yes, sir.

26 Q. What time would you be up there and see George?

A. I used to go downtown and would stop there. I would go in the side way and saw him working on the motors.

Q. You don't know what time it was?

A. No, sir.

Q. What do you mean "side way"?

A. Alley way.

Q. You went in the rear of the store?

A. Yes, sir.

Q. You said he told you and you went down there and saw him staying in the boat one night and watching the boat one night?

A. Yes, sir.

Q. And when was that?

A. The year before he got drowned.

Q. That boat was anchored and he was simply watching it?

A. Yes, sir.

Q. It was tied to the bank?

A. Yes, sir.

Q. And he was simply watching, see[illegible] at nobody carried it away; is that right?

A. Yes, sir.

Q. Do you know whether he was paid by the owner of that boat to watch it, or who paid him?

A. I don't know.

Q. You don't know who paid him?

A. No, sir.

By Mr. Parrish:

Q. There is one thing I forgot to ask you: Did George ever work beyond his usual hours; put in overtime?

27 A. Yes, sir.

Q. I will ask you whether he brought home one of the small outboard motors to work on at home?

A. Yes, sir.

Q. It was while he was working for the Motor Boat Sales?

A. Yes, sir.

Q. It wasn't his boat?

A. No, sir.

The DEPUTY COMMISSIONER. Have you got the birth certificates of the children? Do you want to offer them?

Mr. PARRISH. I do not have them.

The DEPUTY COMMISSIONER. I was wondering about the dates.

Mr. PARRISH. I checked them with the father.

The DEPUTY COMMISSIONER. They sent them in, but they wanted them back, Mr. Bursey said.

Mr. PARRISH. I have them. I will offer them. That is a copy of them, or, if the Commissioner wishes, I will secure birth certificates and forward them to the Commissioner.

Mr. FULTON. Mr. Parrish, do you know that that is a copy?

Mr. PARRISH. No; I can't say I know this is a copy.

Mr. FULTON. It corresponds with what you said.

Mr. PARRISH. I can't agree that it is a copy.

Mr. FULTON. We will accept it as a copy.

Mr. PARRISH. I will secure certified copies of the birth certificates and file them as Claimant's Exhibit No. 2.

And further this witness sayeth not.

GEORGE W. TODD, a witness for the Claimant, having been duly sworn, testified as follows:

28 By the DEPUTY COMMISSIONER:

Q. Give us your name and address.

A. George W. Todd; 4505 Brook Road.

By Mr. PARRISH:

Q. On August 8, 1938, what was your occupation?

A. I was Assistant Manager and outside salesman for the Motor Boat Sales, Incorporated.

Q. Were you an officer of the Corporation?

A. Yes, sir.

Q. What was your official position with the Motor Boat Sales?

A. Vice President.

Q. You were at the company's place of business, 3 West Grace Street, practically every day?

A. Most every day.

Q. What was the purpose of incorporating the Motor Boat Sales?

Mr. FULTON. I object to that. That is not relevant.

Mr. PARRISH. It seems to me that it is relev t to show what the nature of the business is, when his defense is that it does not come under the Maritime Act and it does not apply, we want to show what it was chartered for.

The DEPUTY COMMISSIONER. He can answer that.

Mr. FULTON. Exception.

A. I can't answer that question, because I was elected an officer after it was formed.

Q. What business did the company transact on August 8, 1938?

A. We were in the retail store business, dealing in mari-
29 time supplies of all kinds. That includes the sale of boats—nothing in the yacht class—but some outboard motors.

Q. And accessories: it would include the sale of both?

A. Yes, sir; gasoline motors and parts.

Q. Who engaged the services of George P. Armistead, Jr., the deceased?

A. I don't know. I think he was hired by Mr. Fulton.

Q. Mr. King Fulton, who is present today?

A. Yes, sir.

Q. Mr. Fulton spent most of his ti e about the date of his death in Washington?

A. Mr. Fulton at that time was in Was..ngton.

Q. In his absence you were the officer in charge of the Richmond Store?

A. Mr. Hobbs and I jointly. He was in the office and I was on the outside.

Q. After you were notified of this boy's death, you immediately went down to the river?

A. I was called to see what I could do to notify and help find the body.

Q. You went down immediately?

A. Yes, sir.

Q. From the investigation, it appeared that the boy had been drowned in the channel?

A. Yes, sir.

Q. Which is navigable waters?

A. I think so, from what I understand where it happened.

Q. The ocean going vessels come up further than that?

30 A. I don't know where it occurred. I think it is a navigable stream where they said the boy was drowned.

Q. Assuming it occurred opposite the James River Oil Company's dock, that would be navigable water?

A. Yes, sir.

Q. How many employees did your concern have on August 8, 1938?

A. George Armistead, John Cooper, Welford Lloyd, Randolph Hobbs, Miss Johnson, and myself.

Q. You did not come under the Workmen's Compensation Act of Virginia at that time?

A. No, sir.

Q. And you were not insured under that Act?

A. No, sir.

Q. You have sent for the record as to his wages?

A. I have got it.

Q. You have it?

A. Yes, sir.

Mr. PARRISH. We will introduce that now. I don't know what it shows. We will introduce the chart and the wage can be computed from the records.

The DEPUTY COMMISSIONER. Can you read off the figures for the year prior to his death? I don't know whether you have it for the year. Can you take it approximately for the nearest fifty-two weeks prior to the accident?

Mr. S. KING FULTON. I will mark it.

Mr. PARRISH. So far as I am concerned, your Honor, the overtime shown by the record is so small, I don't think it would have any bearing on the base rate of $13.50 and we will agree on that.

31 The DEPUTY COMMISSIONER. You will stipulate that $13.50 is the average weekly wage?

Mr. PARRISH. Yes, sir.

Mr. FULTON. That is entirely agreeable.

By Mr. PARRISH:

Q. Mr. Todd, this boy was paid in full for the week during which he was drowned?

A. I don't know. That is not for me to answer. I wouldn't be able to answer that.

Mr. FULTON. We can stipulate what he was paid.

Mr. S. KING FULTON. He was paid for the full week. The last payment of $13.50 was for the week of August 8th. I don't know what day that was.

By Mr. PARRISH:

Q. Johnnie Cooper, was he employed on August 8, 1938?

A. Yes, sir.

Q. And he was on the boat which capsized, also; the same boat George Armistead was on?

A. As far as I know.

Q. You found him down there?

A. Yes, sir.

Mr. FULTON. He didn't handle the transaction, but we have the gentleman here that did.

Q. Whose boat was it in which they were riding at the time?

A. The boat belonged to Mr. W. M. Crown and his brother and I think it was owned jointly by the two. It had just been constructed.

Q. You all sold it to them?

A. No, sir; they built it.

32 Q. Whose motor was on it?

A. The property of the Motor Boat Sales, Incorporated.

Q. Outboard motor?

A. Yes, sir.

Q. You had sent the motor down?

A. I don't know.

Q. The company did?

A. I was their salesman. I don't know about it.

Mr. PARRISH. That is all at this time. I will reserve the right to recall him.

By the DEPUTY COMMISSIONER:

Q. Are you still with the company?

A. Yes, sir.

Q. You said the company engaged in dealing in maritime supplies of all kinds?

A. Yes, sir; to cover the boats we handle.

Q. That means that you serviced boats?

A. What do you mean "serviced boats?"

Q. Any kind of equipment they wanted to put on the boat, would you supply it?

A. No, sir; we didn't make a specialty of it. I don't know of any instance where we did installation work.

Q. You sell the boats?

A. The boats we sell are ready to go.

Q. Did you do any repair work after that?

A. No, sir; that was for the boat yards.

Q. How often would your employees go aboard any boat; every day?

A. No, sir; not every day. It was just a rarity that we
33 got on boats. We haven't got any business getting on other people's boats.

Q. Suppose a fellow wanted a compass or chart or some other equipment that you sell, would you deliver it?

A. No, sir; we don't have a delivery truck. The only thing was my car.

Q. What would be the largest boat you handle?

A. 38-foot boat.

Q. Cruiser?

A. Yes, sir.

Q. Cabin on it?

A. Yes, sir.

By Mr. PARRISH:

Q. Your company is agent for the cruiser Chris-Craft?

A. That is the largest one we sell.

Q. You sell all the Chris-Craft people's boats?

A. We sell all we can.

Q. If I came to you to get one, I would get it from you as agent; you never turned it down?

A. No, sir; not on the stuff we handle.

Q. Your concern has done work servicing small boats?

A. In our place.

Q. You have serviced boats on the water?

A. We bring in the boat and fix it.

Q. Didn't you have a representative from your firm at the National Outboard Races?

A. No, sir; not a representative.

Q. Didn't you have a mechanic and service man there?

34 A. No, sir; we didn't have anything to do with it.

Q. Didn't have any representative there?

A. All we did was loan an outboard and motor.

Q. You did have a boat there?

A. Loaned to Mr. Mullen.

By Mr. FULTON:

Q. That was outside of your business?

A. Yes, sir. We have been helpful to him.

By Mr. PARRISH:

Q. Hasn't your firm demonstrated boats for sale on the James River?

A. No, sir; I can't say we have.

Q. To refresh your memory: Didn't you take me riding one day, trying to interest me in a cruiser?

A. Yes, sir; we did. I don't know what boat it was. It seemed to me it belonged to a customer and we borrowed the boat to carry you riding.

By the DEPUTY COMMISSIONER:

Q. Mr. Todd, you said you serviced your own boats?

A. If we trade a boat, which we do, and it is brought in by the customer on a trailer, and if anything is needed to be done to it, like painting, we do it.

Q. Did you do any work on the water?

A. No, sir; we are not equipped for it.

Q. Did you repair engines of boats?

A. No, sir; we don't have any equipment for that.

Q. Any boat while in the water, if the ignition went bad, would you send a man?

35 A. Yes, sir; we have done it. The man would not go out in the water.

Q. The boat would be at the dock in the James River?

A. Yes, sir.

Q. What are these boats used for; for pleasure?

A. The majority are for pleasure.

Q. What do you use them for, if not for pleasure?

A. Unless one of the Indians on the Mattaponi River would buy a boat for his purposes, to take hunting parties.

Q. Did you sell them for moving supplies of freight and cargo?

A. No, sir; we don't have that kind of boat.

Q. They might have used them for fishing parties?

A. It is too nice a boat to be used for fishing parties.

And further this witness sayeth not.

GEORGE PURCELL ARMISTEAD, Sr., a witness for the Claimant, having been duly sworn, testified as follows:

By Mr. PARRISH:

Q. State your full name and address.

A. George Purcell Armistead, Sr.; 22 East Hill Street.

Q. You are the father of the deceased in this case?

A. Yes, sir.

Q. Do you know how long your boy had been working for the Motor Boat Sales, Incorporated?

A. About two years.

Q. Do you know what his work was?

A. Janitor and Mechanic's Helper.

Q. Did you ever see him on a boat of the Motor Boat Sales; if so, where?

36 A. I saw him on the boat. I taken him, his wife, and children on two occasions. He was supposed to go and stay all night, and I left him there.

Q. You left him down there?

A. Yes, sir. I took his wife and children and carried them home.

Q. So far as you know, he stayed there?

A. Yes, sir.

Q. It was your understanding that he stayed there for his boss, Mr. Todd?

A. Yes, sir; everything was what Mr. Todd said do.

Q. Do you recall whether he was sent out of town with respect to his work?

A. He told me he had to go to the Rappahannock or somewhere to help the mechanic with a boat.

Q. Do you recall when that was?

A. No, sir; I couldn't tell when that was.

Q. It was after he went to work for the Motor Boat Sales, Incorporated?

A. Yes, sir.

By Mr. FULTON:

Q. All you know is what he told you?

A. I carried him to the boat; him, his wife, and children.

Q. You don't knew when that was?

A. No, sir; not exactly. He was working for the company, though.

And further this witness sayeth not.

PHIL GOODE, a witness for the Claimant, having been duly sworn, testified as follows:

By Mr. PARRISH:

37 Q. What is your full name?

A. Phil Goode.

Q. What is your age?

A. Forty-three years old.

Q. Where do you live, Phil?

A. Fulton: 14 Orleans Street.

Q. That is about a half-block from the James River?

A. Not quite a half-block; less than half a block.

Q. Did you see the upset of the boat on which George Armistead was riding on August 8, 1938?

A. Yes, sir.

Q. Where were you at the time?

A. I was standing on the hill up by Mr. Sternheimer's; me and another fellow went over there.

Q. Mr. Sternheimer's place is some little distance below the James River Oil Company?

A. Yes, sir.

Q. Joins it?

A. Yes, sir; and the river comes up there like that [indicating].

Q. That is down stream?

A. Yes, sir.

Q. Did you see the boat upset?

A. Yes, sir.

Q. How many people were on it?

A. Two.

Q. Tell what you saw?

A. The reason I went out there was because the boat went down the river making a noise like an airplane. When she come
38 back, we were standing out there, and the current was swift. It was high. When she makes the loop to turn, the boat capsized and the colored man went down and come up and grabbed for the boat and went down, and the white fellow grabs hold of the boat and held it, and, the motor being heavy, it pulled the bow of the boat three and one-half feet in the air, and he was floating down the river hollering help, help, help, and when he got down to where Mr. Mulligan's barge was, and I said, "Lord, see if we can save him," and I went down and was going to get in the boat, but it was locked, and I asked another fellow to help me break the chain, and Mr. Parker's boat was parked there, but it was a log chain on it and we couldn't break it, and this fellow floated opposite Mr. Mulligan's boat, and Mr. Mulligan rescued him and taken him and put him on his boat and taken his little boat and pulled it on the bank. He had two motors demonstrating—one was a sea lion or sea horse—and I never had met the boy and never had seen him to say anything to him.

Q. You mean the boy that was drowned?

A. Yes, sir. I never seen him to speak to him, but I have seen him with other motors, because I thought it belonged to him. I used to go down there because I would hear the noise of the motor, which sounded like an airplane.

Q. You were not any kin to him, George?

A. No, sir. I don't know where he lived. They told me that is his father. I have never seen him to know him.

Q. Where was the motor to be demonstrated?

A. Here is the James River Oil Company, and one was setting here and one was on the boat and the one was on the shore where they had demonstrated.

39 Q. Where that boat upset or capsized, was it in the channel?

A. Yes, sir.

Q. Where boats come in the City Dock?

A. Yes, sir.

Mr. FULTON. No questions.

And further this witness sayeth not.

WELFORD EARL LLOYD, a witness for the Claimant, having been duly sworn, testified, as follows:

By Mr. PARRISH:

Q. Please state your full name?

A. Welford Earl Lloyd.

Q. How old are you, Mr. Lloyd?
A. 36.
Q. By whom are you employed?
A. At present?
Q. Yes, sir.
A. Tignor's.
Q. What is your occupation?
A. I am a mechanic and salesman together.
Q. Have you, in the past, been employed by the Motor Boat Sales?
A. Yes, sir.
Q. When?
A. For about two years off and on; little more than two years, off and on.
Q. During what years; just approximately?
A. I think Mr. Fulton hired me in 1937 and I worked until the latter part of 1938, with the exception of three months.
Q. You were working there when George Armistead was drowned?
A. Yes, sir.
Q. What was the nature of your duties?
A. I had charge of the shop.
Q. You would work on motors?
A. Yes, sir.
Q. You knew George, of course?
A. Yes, sir.
Q. What did he do around there?
A. The first thing he did was clean up the place. Sometime it would take a half day to a day, and he was in the shop cleaning up motors, buffing tanks, and making deliveries.
Q. General handy man?
A. Yes, sir.
Q. And, as far as possible, he assisted in cleaning up and working on the motors?
A. I had another helper.
Q. He did assist you?
A. Yes, sir.
Q. You were in the shop the day he went down the river and was drowned?
A. Yes, sir.
Q. I will ask you if he wasn't sent down by his employer to assist in lifting two motors?
A. Yes, sir.
Q. Who went with him?

A. Johnnie Cooper.

Q. What was his job?

41 A. He is a Mechanic's Helper. That is his rating. He was in there to help me.

Q. He was a white man, was he?

A. Yes, sir.

Q. If a colored helper, like George, would go out on some mission, the colored fellow would be subject to the orders of the white fellow?

A. Yes, sir; I suppose so.

Q. He had been out with you?

A. No, sir.

Q. He is shown to have been to the river on occasions with other people?

A. I don't know about that, but he never went with me.

Q. When he went out, he was subject to orders?

A. Yes, sir.

By Mr. FULTON:

Q. Mr. Lloyd, you were the mechanic up there, to do the mechanical work on the motors?

A. Yes, sir.

Q. Was George Armistead, the colored boy referred to here, was he a mechanic?

A. No, sir; he wasn't a mechanic.

Q. The work he did on the motor was cleaning it up?

A. After it was pulled down.

Q. To clean up the parts and wash them off?

A. Yes, sir; and dry them. I would take them and put them up and he would buff the tank—shine the tank—so it would look nice.

Q. And that was the only kind of work he did on the motor?

42 A. Except cleaning. I can't say he didn't take a nut off, but he didn't pull it down. Probably I remember the time that he would take a wrench and take the nut off, when he was waiting for the engine, to clean it up.

Q. His duties up there in the store was cleaning up the store and opening up the store in the morning, washing windows, cleaning motors, and driving automobile for making deliveries over town?

A. He had a schedule to go by.

Q. I will ask you to look at that and pass it over to Mr. Parrish.

A. I don't know whether it is the same one, but it is similar to it.

Q. Now, as a matter of fact, above the first floor of the store, was two apartments upstairs?

A. Yes, sir.

Q. Did George clean up those?

A. Yes, sir; and dump the trash.

Q. You said that looks like it?

A. It looks like it, I think.

Mr. Fulton. I would like to file that as Defendant's Exhibit No. 1.

Q. Now, in delivering any boats, small pleasure boat or outboard motors, would George drive the automobile down or conveyance down to make those deliveries?

A. He probably would, sometimes.

Q. He would go along to help do that?

A. Yes, sir.

Q. Who was the Mechanic's Helper at the time George was killed?

43 *Defendant's Exhibit No. 1*

Weekly Schedule for George P. Armstead, Jr.

Monday:
1. Wash front door (woodwork), desks, and floor in both offices.
2. Dust and clean one-third of merchandise tables.

Tuesday:
1. Wash windows.
2. Clean boats and motors.

Wednesday:
1. Wash front door (woodwork), desks, and floor in both offices.
2. Dust and clean second third of merchandise tables.

Thursday:
1. Clean boats and motors.
2. Wash front floor of showroom.
3. Wash washrooms.

Friday:
1. Wash front door (woodwork), desks, and floor in both offices.
2. Dust and clean third third of merchandise tables.

Saturday:
1. Wash windows.
2. Sweep shop and clean same.

Monthly Schedule

First of month:
1. Wash windows and skilights out back.
2. Clean front halls and steps.
3. Shine all brass stock.

4. Wash woodwork and walls in offices.
Fifteenth of month:
1. Wash woodwork and walls in offices:
2. Clean down back steps.
3. Clean front halls and steps.

44 A. Johnnie Cooper.

Q. Who was in charge of the office on the particular day George got drowned?

A. Mr. Hobbs.

Q. That gentleman sitting back there [indicating]?

A. Yes, sir.

By Mr. PARRISH:

Q. I notice on the schedule that two days a week he had to wash windows and clean boats and motors—Tuesday and Thursday—that is correct, isn't it?

A. Yes, sir; that is correct on it.

Q. There must have been right many motors on hand to require two days?

A. Outboard motors. After you have been over it, you can rub your hand over it and spot it and have to go over it every day.

By Mr. FULTON:

Q. Dusting them so they would look well?

A. Yes, sir; so they would look well to the public.

Q. They would be on the floor?

A. On stands.

Q. And he would go and dust them off?

A. Yes, sir.

By Mr. PARRISH:

Q. During the busy season, from April to August or September, you would have quite a few motors in the shop?

A. That isn't a particular busy season.

Q. When is the busy season?

A. In the Spring and in the Winter we are busy over-
45 hauling motors and I believe we are medium busy all the year.

Q. You had enough work to keep a mechanic and helper all the time?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. Would you have requests to go to work on boats?

A Service boats? I have done it.

Q. About how often would you do that; several times a week?

A. No, sir; it wouldn't average that; no, sir. The most we had was when the firm sold a Chris-Craft and would put it over board. My main job was outboard motors, but I have serviced a few engines.

Q. What would you have to do when you put them out?

A. All that happens is that it has to be slung and put out.

Q. How often would you do that?

A. One each week end for three week ends, and that is the largest number.

Q. But you did service them while the boat was in water?

A. Yes, sir; soon after you do that. We didn't pull it up and tie it to the dock.

Q. Did you test them?

A. The customer had to be on the boat, and we couldn't operate the boat and be in the cockpit.

Q. But you would do it?

A. Yes, sir; but the customer drove the boat.

Q. But you went along?

A. To adjust the carburetor or anything like that.

Q. How long was that boat?

46 A. One was thirty-five feet and the rest of them were much smaller. The average small boat would run from twenty-two to twenty-four or twenty-five feet.

Q. They would have larger motors?

A. Yes, sir.

Q. How large?

A. The largest have two 6-91 grade.

Q. Ninety-one horse power in each motor and there were two?

A. Yes, sir.

By Mr. PARRISH:

Q. When you would get a new boat in the water, there would be some adjustments to make before turning it over to the customer?

A. They come on the box car ready to run. They get at least three test runs in the factory.

Q. Before you finally delivered it, wouldn't you make some adjustments?

A. If it needed it. I was at the Chris-Craft Factory and they try it out and get it ready to run.

Q. You would go down and service some?

A. Some few.

By the DEPUTY COMMISSIONER:

Q. What would be the longest trip you made?

A. Fifty or sixty miles.

Q. Down the James and back?
A. Not on the James, but at West Point.
Q. Did you start from the Richmond dock?
A. No, sir. I would go down in the car.
Q. You would have to go in your car?
A. A majority of the time the customer took us in his car.
47 Q. How far would you go in the boat?
A. No special distance.
Q. Just run up and down to test it?
A. Had to do that.
Q. It would cover several miles?
A. It wouldn't cover several miles.
Q. And then you would be through and come back in your car?
A. Yes, sir.

By Mr. PARRISH:

Q. You would, on occasions, make trips to West Point and Tappahannock and other rivers?
A. In those directions, but not those points.
Q. On the Rappahannock River?
A. Yes, sir: some few jobs.
Q. Sometimes you would take a helper?
A. It depends.

By the DEPUTY COMMISSIONER:

Q. It was the same type of boat, thirty-five feet or smaller?
A. Didn't service that large a one but once; rest were smaller.

By Mr. FULTON:

Q. I understood you to tell the Court when a boat was sold by this company to a customer that it had been customary to have it tested at the factory, and he would take you down and have you present when the boat was put in the river, and he would operate the boat and not you?
A. What do you mean going down?
Q. On the trips?
A. On the water?
Q. You told him that you went down with the customer
47 and would be present when he would take the boat and go down for him and with him and be present when the engine was started and the boat was tried out?
A. Yes, sir.
Q. Did you run the boat or the owner?
A. The owner.
Q. All you did was simply to be there and make any minor adjustment?
A. We didn't drive the boat.

Q. That is what you went for?
A. Went more for pleasure.
Q. He sometimes wanted you to go?
A. Yes, sir.

By Mr. PARRISH:

Q. You got paid for the pleasure, didn't you, Mr. Lloyd?
A. Yes, sir.

By Mr. FULTON:

Q. In that case you didn't operate the boat; it wasn't the Motor Boat Sales, Incorporated, boat and you were simply present to see what was done?
A. It wasn't the Motor Boat Sales boat.
Q. It was the boat of the purchaser?
A. It wasn't the property of the Motor Boat Sales, because it was sold and was not on display.

By the DEPUTY COMMISSIONER:

Q. You would service it, if the company sent you down to service it?
A. Yes, sir; if it needed anything.
And further this witness sayeth not.

49 RANDOLPH HOBBS, a witness for the Defendant, having been duly sworn, testified as follows:

By Mr. FULTON:

Q. Will you state your name and your age and by whom you are employed?
A. Randolph Hobbs; 28; employed by S. King Fulton, Inc.
Q. Washington?
A. Yes, sir; Washington, D. C.
Q. Were you employed by the Motor Boat Sales, Incorporated, on August 8, 1938, when it was said that George P. Armistead, Jr., got drowned?
A. Yes, sir.
Q. What were your duties up there?
A. I was Treasurer of the Corporation, in charge of the office, and more or less Store Manager, in charge of the general operation around the store itself.
Q. Was George Armistead employed there at that time?
A. Yes, sir.
Q. How long had you been employed by the Motor Boat Sales, Incorporated, at that time?
A. I had been with the Motor Boat Sales since May 1934.
Q. What was George employed as; what was he employed to do up there?

A. George was employed as a porter.

Q. Did he fill out the Social Security cards and send them in while you were there?

A. Yes, sir. While he was employed at the store the Social Security Act was put in effect.

50 Q. Would you know George's signature?

A. Yes, sir.

Q. I hand you paper here which is headed "Previous employment (last position first)," and what is known as a Social Security Card, to be filed with the Government and reporting to it; look at that and see if that is George Armistead's signature?

A. Yes, sir; I would say that is his signature.

Q. Would you pass that over to Mr. Parrish? The second line would be the item covering him.

Mr. PARRISH. What do you want to prove by that?

Mr. FULTON. He said what his position was at that time and his former position.

Mr. PARRISH. All right.

By Mr. FULTON:

Q. I want you to read into the record from that card. This is a copy of the card, duplicate original, and was filled out by you and filed with the Government?

A. Yes, sir.

Q. The card is headed "Previous Employment (last position first)," and under that Column four 6 17 36 Motor Boat Sales, Inc., 3 West Grace Street, Richmond, Virginia; position, Porter; rate of pay per week, $10.00; and that is then signed George P. Armistead, Jr.; is he same party that was drowned and about which the testimony has mentioned here?

A. Yes, sir.

Q. Was he a mechanic?

A. No, sir.

Q. Was he employed as a mechanic?

A. No, sir.

51 Q. Did he have any duties to perform as a mechanic?

A. No, sir; not as I recall.

Q. Did he have any duties to perform, either maritime operations in navigable waters—that is, the James River or other navigable streams? Was he employed to do any work of a maritime nature?

A. Was he employed for the purpose of working on the river?

Q. Any work on a river?

A. Porter in the store, primarily.

Q. You were there the day that George went down to the James River?

A. Yes, sir.

Q. What was he instructed to do, if you know, when he left your store?

A. George was instructed, to the best of my knowledge——

By Mr. PARRISH:

Q. Did you give the instructions?

A. No, sir.

Q. Were you present when they were given?

A. No, sir.

Mr. PARRISH. I object.

By Mr. FULTON:

Q. You don't know what he was instructed to do?

A. He was instructed to go——

By the DEPUTY COMMISSIONER:

Q. Who gave the instructions?

A. Perhaps I can clarify it.

By Mr. FULTON:

Q. What occurred?

52 A. To the best of my knowledge——

Mr. PARRISH. That is vague and indefinite. We want the facts.

The DEPUTY COMMISSIONER. Whether you remember it?

A. (Continuing.) These two gentlemen came by the store with their boat.

Q. What were their names?

A. Mr. Crown and his brother and we had these two motors at the store and it was agreed to let these two motors go down the river. Mr. Lloyd and I talked with Mr. Crown and we decided to let the motors go down the river to be operated on the back of Mr. Crown's boat. George Armistead, at the time, was instructed to go along to help lift these motors from the car to the boat—each of these motors weighed a little better than seventy-five pounds apiece—and to help load them in the car when they got through.

Q. Do what?

A. Load them back in the car when through.

Q. Help load and unload them?

A. Yes, sir.

Q. Did he have any directions to get in the boat to go in the river to do anything?

Mr. PARRISH. I object, unless it is shown that this witness instructed George Armistead.

By the DEPUTY COMMISSIONER:

Q. Did he have authority to give him instructions any other time during his employment?

A. Yes, sir.

Q. You were his immediate superior?

A. Mr. Todd and I and he worked for Mr. Lloyd.

53 Q. All three of you?

A. Yes, sir. If Mr. Lloyd wanted a motor carried anywhere or if anybody wanted a hand, George helped.

Q. You can state whether he was going down to the river and what he was going for?

A. He was not instructed to enter the boat.

Q. Any time?

A. No, sir.

Q. Did you see this boat these men were going to try out?

A. Yes, sir. I examined it on the trailer.

Q. Describe it?

A. It was fifteen feet long and of good construction, following along boats of that type. The boat was a V-bottom boat. That refers to the design of the boat and compares in average and is a fairly safe boat of its type. It conforms to the outboard run about.

Q. Did it have a cockpit and deck over the top of the boat?

A. It had a deck over the forward part of the boat and the rest of the way it was open, with seats, and the stern was fixed so it could be attached with an outboard motor.

Q. You don't know who gave him instructions to go down there?

A. Yes, sir; I think I do.

By Mr. FULTON:

Q. But you don't know of your own knowledge?

A. No, sir; I can't say I definitely know who gave him instructions to go down there.

By the DEPUTY COMMISSIONER:

Q. It would be you, Mr. Todd, or Mr. Lloyd?

A. Yes, sir. I must have given permission to take the

54 motors out of the shop and I gave that permission to Mr. Lloyd.

Q. Who went with him?

A. Cooper; Johnnie Cooper.

Q. He was a Mechanic's Helper?

A. Yes, sir.

Q. Did you instruct him to go down or somebody else to do that?

A. Yes. I didn't instruct Johnnie directly, but I gave my consent. Mr. Lloyd asked me if it would be all right for Johnnie to go and I gave my consent.

Q. He was allowed to go with your knowledge and approval, whether you consented or not?

A. Yes, sir.

Q. You didn't tell him what to do that day?

A. Not particularly that day, but George was instructed not to get on boats and he was particularly instructed about that, but sometimes he might do some work on motors. We didn't want him working on the mechanic's work; didn't want people to see him working on motors.

Q. He would have to get in the boat, if his job was to lift it in the boat?

A. Not particularly. The stern was pulled on the shore and the motor was attached to it.

By Mr. Fulton:

Q. You said he was given specific instructions. Did he have any authority or instructions to ride on boats, perform any duties on navigable rivers, or any other kind of rivers?

A. No, sir.

By the Deputy Commissioner:

Q. Did he ever, for the benefit of the company or with your knowledge, act as watchman for any boats over night?

A. He acted as watchman on a thirty-five foot Chris-Craft we sold Mr. Warner Moore and he was paid by Mr. Moore and he was not there at our request and George stayed in the store and finished his work and was back the next morning.

Q. He wasn't your employee and the other man paid him and directed him what to do?

A. Yes, sir.

By Mr. Fulton:

Q. He never stayed on any boats for you?

A. No, sir.

By the Deputy Commissioner:

Q. You never sent him out on any mission of that kind?

A. To stay on a boat or run it?

Q. Yes, sir.

A. No, sir.

By Mr. Parrish:

Q. You stated that he worked in the store primarily. He would do anything that you told him?

A. Yes, sir; I think George would.

Q. The fact that he went out on this occasion, apparently under somebody else's instruction, shows that you sent him outside of the store on occasions?

A. Yes, sir.

Q. Mr. Hobbs, do you know who told him to go down the river on this occasion?

A. I can't definitely say that I do. I think Mr. Lloyd can.

Q. Generally, the purpose was for him to assist in helping to take the motors and putting them in the car from the shop and out of the car on the boat and back off the boat in the car and back to the shop?

56

A. Yes, sir.

Q. It usually took two men?

A. Yes, sir.

Q. You weren't going to put both motors on at the same time?

A. No, sir.

Q. You were just testing them at the same time?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. You didn't send them down in a truck?

A. In Mr. Todd's car.

Q. How would you get a boat down there?

A. The Corporation has a trailer and take Mr. Todd's car.

Q. And tow them down there?

A. Yes, sir.

Q. Didn't George go on other occasions to take a motor and bring it back; how often?

A. No, sir; George was not there in the capacity of delivery boy. He would put motors in the car and deliver them to different parts of town. I can't recall another instance where George was sent to the river.

Q. You didn't send him down with instructions to put motors on the boat or lift them on the boat?

A. No, sir. He was purely in the capacity of strong-arm man, to help the mechanic get it from land to water.

By Mr. PARRISH:

Q. Who notified Jessie of George's death?

57

A. Mr. Todd. I think it was the undertaker first.

Q. From your company?

A. Mr. Todd.

And further this witness sayeth not.

WELFORD EARL LLOYD, a witness for the Defendant, having been recalled, testified as follows:

By Mr. FULTON:

Q. You have previously been called by the other side and testified that, on the day George Armistead was drowned, Mr. Crown or the two Messrs. Crown came by the Motor Boat Sales, Incorporated, and that they had on their trailer their boat, and that they came in to look at some outboard motors, being interested in

one to use on their boat; just what occurred with respect to your instructions; what did you instruct George Armistead with reference to his work?

Mr. PARRISH. He has testified to that. He testified that he didn't give him any instructions.

A. I didn't testify that I didn't give him any instructions.

By Mr. PARRISH:

Q. Tell us what you said.

A. Mr. Crown came by our place. He asked me to look at this new boat that he or his brother made. He looked at two engines in the garage; one was an Elto and one was a Johnson; and I don't know whether I said first or Mr. Crown that I would like to try the motors in the boat. The motors, both of these were too large to put in the test barrel at high speed, because they would throw the water out. We wanted to try them, as I testified, and I went to Mr. Hobbs and asked him could he send them down to the river and help him.

By Mr. FULTON:

58 Q. What did you tell George Armistead to do?

A. He was instructed to get the equipment ready for any trip I was going on. George was instructed to help Johnnie take it off the trailer and help put in on the boat, but he was not instructed to ride on the boat.

Q. That was the instructions?

A. Yes, sir.

Q. And he left the store under those instructions? Had he authority or direction from you, while there, to go out on the river riding in a boat that was operated in deep water?

A. Not any kind of water. The majority of times he would leave the store he would deliver a motor around town which had been repaired.

By the DEPUTY COMMISSIONER:

Q. He was instructed to help get the motor out of the trailer to the boat, and when through, reverse the procedure?

A. Yes, sir; that is right.

By Mr. PARRISH:

Q. As well as you can recall, Mr. Lloyd, what was said by you to George when he left to go down to the river on this occasion?

A. Well, I suppose——

Q. I asked you what you said, not what you supposed?

A. As well as I recall, I either told Johnnie to take George or I told George to go and help. I can't say whether I told George or Johnnie.

Q. You don't know whether you gave the instruction to George or Johnnie?

A. I don't know. Usually I may have told George. I
59 wouldn't transfer the message through the other.

Q. Was that as far as your instructions went; to take the equipment down and after it was tried out bring it back?

A. Yes, sir.

And further this witness sayeth not.

WILLIAM CROWN, a witness for the Defendant, having been duly sworn, testified as follows:

By Mr. FULTON:

Q. Are you one of the Messrs. Crown that went to the Motor Boat Sales, Incorporated, on August 8, 1938, with a boat?

A. I am the only Mr. Crown that went by there.

Q. And you were the party that went by?

A. Yes, sir.

Q. And that boat was yours?

A. No, sir; it was my brother's. I had charge of it at that time.

Q. You did take it on your trailer to the James River?

A. Yes, sir. We had the boat built. My brother built it. He was a mechanic. I wanted to show it to Mr. Todd and Mr. Lloyd. We got acquainted with them through our four-cylinder Elto motor that we had. We put it on the trailer and I carried it by the Motor Boat Sales and pulled up in the back alley and went in and told them I had something I wanted them to see, and they came and looked it over. I wouldn't say for sure, Mr. Lloyd or Mr. Hobbs—either one or the other of them, I don't know which way it came up—said they had two motors to try out, and I took the boat on the trailer and we made arrangements to meet at the river at two o'clock, and, in the meantime, I goes to the
60 shop where my brother worked, Sash Door and Glass, and told my brother what arrangements I made, and he was anxious to see it, and he got the boss to let him off. He called the other people, the Miller Manufacturing Company——

Q. You needn't tell about that?

A. He got off and went down. I don't know whether we got there first or George and Johnnie, and we took the boat and put it in the river, and one end of it was in the river and one end was on the bank. It was too heavy for one man to get on the boat and put the motor on, and George stands on the bank and lifted it on the boat to clamp on it and shove it in the water to right it.

Q. Was George Armistead told by you or by Mr. Johnnie Cooper, the boy that went from the Motor Boat Sales down, to get in your boat and ride, or was he ordered and directed not to?

A. Yes, sir.

Q. Did he have any work to do on the boat?

A. None at all.

Q. You were present when he was told to go down with these motors?

A. Yes, sir.

Q. And you were present when they got down there?

A. Yes, sir.

Q. And you never heard anyone tell George to get in the boat and ride?

A. No, sir.

Q. Was it your boat that capsized in the river when George was drowned?

A. Yes, sir. The boat was coming straight up the river
61 and it hit something and turned towards the Manchester side, and that is the side that George went out and Johnnie went out toward Richmond, and George made a couple of strokes, like he was going to swim to the Manchester side, and Johnnie went towards Richmond and he got back towards the boat, and it didn't seem like George got a good hold on the boat. It was on an angle, the nose of the boat was upside down, and it drifted down the river like that, because the weight of the motor held the stern down.

By Mr. PARRISH:

Q. What kind of rigging did you have on the boat for the motor?

A. It was just an outboard motorboat. It was made to clamp on an outboard boat.

Q. Did you have any forward control?

A. No, sir.

Q. One man couldn't put the motor on?

A. Not very handy; could if he was a good man.

Q. He would have to be a big strong man?

A. He would have to have a good bit of strength, but we didn't take a chance.

Q. Did you see the accident?

A. Yes, sir.

Q. Were you there when they went out?

A. Yes, sir.

Q. How did they happen to go out in the boat?

A. Like I said at first, we wanted to try it and they had gotten down there and they put the Johnson motor on and tried it and went on and rode the river and——

Q. Who went on that trip?

A. All four of us. There was a rock or a rock pile in the river.

62 Q. Big rock in the river about opposite the City wharf?

A. Yes, sir. They went just this side the rock and turned around then and came in and I looked at my watch and I didn't have much time and they had an Elto motor they wanted to try.

Q. You took the other one off?

A. Took the Johnson off and put the Elto on and we had a little trouble getting it started. The battery was weak, one of them, and they took the battery out of our car and tried to borrow one from the Little Oil Company and couldn't get one and took it from our car and Johnnie and George went out in the boat.

Q. You didn't have time to go?

A. I didn't have time to go, but I stayed there to bring the boat home. It was built to move anywhere you wanted to take it. They put the Elto motor on and made the trip and came back to the bank and wanted me and my brother to go. I told them "no," and they had a little gas to burn in the carburetor and they made another trip up the river and down the river; I don't know how far and they were coming back up the river and got in between the Little Oil Company and the Standard Oil Company's warehouse, the boat was coming up the river and hit something and it was knocked loose on the bottom, not enough to sink, but we had to repair it when we got it home. We took some clamps and some wrenches and fixed it.

Q. Were you there when they got there with the motors?

A. I don't know.

Q. But it was approximately the same time?

A. I might have been there first.

Q. Whichever got there first would have to wait?

A. Yes, sir.

63 Q. And Johnnie and George put the motors on?

A. Yes, sir.

Q. And then went through the trips you have explained?

A. Yes, sir.

By Mr. FULTON:

Q. You put the motor on the end?

A. Yes, sir. George had hold of the propeller and Johnnie had hold of the motor, inside the boat. He had to clamp it on.

Q. And the outside of the boat was standing on land?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. You said something about righting the boat.

A. Righting the motor. It was standing on a slant.

Q. Who put the boat off the bank?

A. All four of us.

Q. Was George in the boat?
A. He was helping us.
Q. Did he hop in?
A. He got in.
Q. I am talking about the second time they took the trip.
A. I don't think George got out.
Q. I understood you to say he was on the bank and the other fellow was inside?
A. When they hooked it first Johnnie was inside and George was outside. Johnnie got in the boat and George handed the motor over and held the propeller and he clamped it.
Q. That was the first trip?
A. Yes, sir.
64 Q. About the second trip; how about that? Were you still there?
A. Yes, sir. I don't know whether George took the battery out there or Johnnie or one of us. The boat was in the water.
Q. The boat was in the water?
A. Yes, sir.
Q. When it was on the bank was the first trip?
A. Yes, sir.
Q. Were you figuring on buying it, if you liked it?
A. I don't know whether I was figuring on buying it or not, but right now we own the motor.
Q. You had some interest in it?
A. In the Johnson motor.
Q. They were quite interested to sell?
A. To see whether the boat would carry the motor.
Q. They were interested in selling a motor?
A. That is true. They had two motors and they didn't have any way to test them in the shop.
Q. Two men were down on company business; we can agree on that.
A. No answer.
And further this witness sayeth not.

JOHN SAMUEL COOPER, a witness for the Defendant, having been duly sworn, testified as follows:

By Mr. FULTON:

Q. State your name and your age.
A. John Samuel Cooper and I am twenty-one.
Q. Where were you working on August 8, 1938?
A. Motor Boat Sales.
65 Q. How long have you been working for them?
A. I went to work March 15th.
Q. 1938?

A. Yes, sir.

Q. And you had been working for them from that time on up through August 1938?

A. Yes, sir.

Q. You are still working for them?

A. Yes, sir.

Q. And have been with them ever since?

A. Yes, sir.

Q. What were you employed to do?

A. I was to help Mr. Lloyd, the mechanic. I worked on motors and repaired motors; helper to Mr. Lloyd.

Q. Helper to Mr. Lloyd?

A. Yes, sir.

Q. What were George Armistead's duties?

A. Wash up motors and polish them and general helper, and in the mornings, sweep in the store.

Q. You heard Mr. Lloyd testify, and that was his testimony?

A. Yes, sir.

Q. You also heard Mr. Hobbs testify as to that?

A. Yes, sir.

Q. On that day, August 8th, that Mr. Crown came by, what was George Armistead, the colored boy that was later drowned, what was he going with you down the river for?

A. To help me.

Q. Do what?

66 A. Take the motor off the trailer and put it on the boat and take it off when finished.

Q. Did he have any duties in running a motor on out in the water?

A. Not to my knowledge.

Q. Did you instruct him to get in the boat or did he go on his own accord, for a pleasure ride?

A. He went on his own accord.

Q. You were up there when you were told to take the motor down and he went along to help unload the motors from the trailer and attach them to the boat and take them and put them back in the trailer?

A. Yes, sir.

Q. And they were his sole duties?

A. Yes, sir.

Q. You heard what was said to him?

A. Yes, sir.

Q. You never gave him any and you didn't hear anybody give him any duties to go on water?

A. Not to my knowledge.

Q. When these motors were taken off the trailer and each one was attached to the boat, where was the end of the boat?

A. Sitting on the shore, like Mr. Crown said.

Q. Was that true when you took the Johnson motor off the boat and put the other motor on, that the boat was pulled up on the shore and one motor was taken off and the other motor was put on?

A. Just the back end was out of the water. The whole boat was not out of the water; just the back end.

Q. At the time the accident happened, who was driving the boat?

A. I was driving the boat.

67 Q. What caused it to turn over?

A. Striking some object.

Q. Was the river clear or muddy?

A. Muddy.

Q. The boat capsized and threw you and George out and you hung on the boat until rescued?

A. Yes, sir.

By Mr. PARRISH:

Q. Mr. Cooper, you were present when Mr. Crown testified, weren't you?

A. Yes, sir.

Q. You heard all of his testimony?

A. Yes, sir.

Q. It is true that the four of you took the first trip with the Elto motor?

A. With the Johnson motor.

Q. And who took the second trip, you and George, with the Elto motor?

A. Yes, sir.

Q. You apparently put the motor on to try it out?

A. Yes, sir.

Q. You couldn't put it on alone?

A. No, sir.

Q. George helped?

A. George and Mr. Crown.

Q. You didn't tell George not to get in that boat on either occasion?

A. No, sir.

68 By Mr. FULTON:

Q. You didn't tell him to get in the boat?

A. No, sir.

Q. He had no instructions to operate the boat on the river?

A. No, sir.

By Mr. PARRISH:

Q. He had no instructions either way?

A. No, sir.

The DEPUTY COMMISSIONER:

Q. You said the motor was put on when they had taken it to the bank?

A. Yes, sir.

Q. If they attached it to the boat out of the water, how would you get it in the water?

A. Mr. Crown and his brother helped shove it off.

Q. Where was George when you were getting it pushed overboard; do you recall?

A. The first trip?

Q. Second one?

A. He was in the boat.

Q. He didn't get out?

A. He possibly got out to help get the battery and put that in the boat.

Q. Did he help take the first motor off and put the other one on?

A. Yes, sir.

Q. What was the purpose of the second trip?

A. To try the motor out and see how it operated.

Q. You could handle it all right whether by yourself or
69 with somebody else?

A. Yes, sir.

Q. He didn't do anything to assist you?

A. No, sir. He did sit in the front and keep a lookout.

Q. What was the purpose of that?

A. The water was muddy and to see if he saw anything.

Q. Was that necessary or helpful to you?

A. It was helpful.

By Mr. FULTON:

Q. Did you give him any orders to sit in front?

A. No, sir.

Q. There was a seat up front and he was sitting there?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. And he was to be there until you were ready to go back to the store?

A. Yes, sir.

By Mr. PARRISH:

Q. What sort of battery was this?

A. Six volt.

Q. Automobile battery?
A. Yes, sir.
Q. Is that the sort of battery you had to start it with?
A. Yes, sir.
Q. Did you have two batteries there?
A. Yes, sir.
Q. The first battery was not powerful enough to start it?
A No, sir.
70 Q. And that was put on the boat?
A. In the boat.
Q. Did you hook the two batteries up?
A. I believe we did hook them up.
Q. Was it necessary for George to help hook them up?
A. I did it myself.
Q. Could you start the motor by yourself?
A. Yes, sir. There wasn't room for but one and I could start it.
Q. It was hooked up by cable?
A. Yes, sir.
Q. The ordinary cable, does it have connections so you can hook up two batteries?
A. The ordinary cable you can hook two batteries if you have the tools and a piece of wire.
Q. A battery has two poles?
A. Yes, sir.
Q. The ordinary cable does not have two connections?
A. Yes, sir.
Q. You can have three connections?
A. Three separate cables.
Q. How would you hook them up?
A. One cable runs to the positive side. That went to the starter and switch on the motor, and the other one went to the ground of the motor.
Q. How did you hook the other positive and negative?
A. With a cable.
Q. Who held that cable?
A. It was stationary.
71 By Mr. FULTON:
Q. That was a small boat; about what would it weigh?
A. I wouldn't like to have to say. Around about 200 or 225 pounds. It is hard to judge the weight of a boat.
Q. The Motor Boat Sales never sold an eighteen-ton cruiser while you were up there?
A. No, sir.

By the DEPUTY COMMISSIONER:

Q. How often did you go down to work on boats?

A. Not very often. This was the first time I had been down for some time.

Q. Did you go on other trips?

A. No, sir; I had a boat of my own.

Q. Did you go for the company on similar jobs, to put a motor on a boat or to test it out?

A. Not that I remember.

Q. This was the only time?

A. Yes, sir.

And further this witness sayeth not.

S. KING FULTON, a witness for the Defendant, having been duly sworn, testified, as follows:

By Mr. FULTON:

Q. State your name and what connection you had with the Motor Boat Sales, Inc., on August 8, 1938, and prior thereto?

A. S. King Fulton: I was President of the Corporation in August 1938. I was inactive, because I was in business in Washington, but I made a trip down occasionally; one or two trips a months; periodic trips.

Q. Did you hire this boy, George P. Armistead, Jr., who
72 got drowned on August 8, 1938?

A. I did.

Q. How long had he been with the Company?

A. I think since 1936 or 1937; two or two and one-half years.

Q. What were his duties?

A. He was a porter. We had a porter that lived on the premises, but when George took the job, he was married, and he did not live on the premises. He was a porter and operated under my supervision and in December 1937, at which time I went to Washington——

Q. Were his duties ever changed? You went backward and forward.

A. No, sir.

Q. What instructions did you give him and other employees, generally, when they delivered things, about going in other people's boats?

A. George was cautioned never to go into a boat or have anything to do with a boat or motor, as explained by Mr. Hobbs. The class of boat we sell our customers does not demand a sale's technique. I had very rigid rules in regard to handling boats. Prior to November 1 I laid the law down very rigidly in regard to that. I think everybody in the store knew my ruling.

Q. What was your ruling: not to go out in rivers or boats for anybody?

A. Yes, sir.

By Mr. PARRISH:

Q. When did you lay down that law? Prior to December 1937 when you went to Washington, wasn't it?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

73 Q. What is the general nature of your business? Perhaps I do know it, but I would like to get it in the record.

A. We sell boat supplies, maritime supplies, motors for outboard boats, and outboard boats and rowboats, sailboats, and cruisers.

Q. To what extent did you deliver them on board vessels?

A. They are new boats and they come in on flat cars. All boats we sold were put overboard by the Richmond Sand and Gravel Company, and the owner went aboard, and when I was here I went, and in some cases the mechanics went, but when I was at the boat. The only thing that had to be put on the boat was the propeller. The boat came on a flat car, and the reason that was not on was because it might get broken. It was put on on the flat car, and the Richmond Sand and Gravel Company picked them up with a crane and dropped them overboard.

Q. You had nothing to do with unloading them?

A. No, sir. We contracted with the Richmond Sand and Gravel Company to do that.

Q. When you furnished supplies, did they get them?

A. They did. The boats were well equipped.

Q. If I owned a boat a year or two and wanted some work done on it, would you do it?

A. Very few boats were kept in Richmond since 1937, when they obsoleted this harbor. We didn't have a delivery truck; and if they wanted to bring them down, we would work on them. If it suited them to bring the boat down, we would work on it.

Q. Would your salesmen take a boat out?

A. Not to my knowledge.

Q. What would a person do if he wanted to see the boat on the river?

74 A. The owner would, if he liked the boat, get somebody that had one to take him.

Q. You sell these boats?

A. Yes, sir.

Q. If you wanted to interest people, you would take them out and run them around the harbor?

A. The boats are not here.

Q. I thought perhaps——

A. Take Warner Moore and Doctor Herring; they would invite the customer and show them the boat. The big boat would sell themselves, and there is not much the salesman can do except point out certain advantages.

Q. You didn't feel that your work was such that you had to have coverage under our Longshoremen's and Harbor Workers' Compensation Act?

A. The boats were insured until they were put overboard.

Q. I am talking about compensation coverage.

A. I don't know. I couldn't answer that. Mr. Hobbs could answer that.

By Mr. FULTON:

Q. Did you handle any boats weighing eighteen tons, such as are referred to in Section three?

Mr. PARRISH. Is that material?

The DEPUTY COMMISSIONER. I don't think it is material, because the requirement is that for a vessel under eighteen tons the person going aboard must be engaged by the master.

Mr. FULTON. I want to show that he had a small boat.

Mr. PARRISH. We will admit that.

The DEPUTY COMMISSIONER. That may be subject to our Law. Is that all?

75 Mr. FULTON. That is all.

By Mr. PARRISH:

Q. Mr. Fulton, you have delivered a good many boats in Richmond?

A. Yes, sir; and quite a few throughout Virginia.

By the DEPUTY COMMISSIONER:

Q. Did this man have occasion, under your direction, to act as watchman?

A. I was here when that specific case came up that they mentioned. I took Mr. Warner Moore and carried him to the Chris-Craft factory and he saw the boats in action and bought one and I can state definitely that I did not allow him to go on board the boat. George was a fine colored boy.

By Mr. FULTON:

Q. Was he employed to work on a boat?

A. No, sir.

Q. It has been in evidence that he acted as a night watchman.

A. Warner Moore engaged him.

Q. Who employed him to act as night watchman?

A. Warner Moore, Jr., he employed him.

And further this witness sayeth not.

The DEPUTY COMMISSIONER. Do both sides rest?

Mr. PARRISH. Yes, sir.

Mr. FULTON. Yes, sir.

Mr. PARRISH. I overlooked filing the burial expense.

The DEPUTY COMMISSIONER. We have it.

Mr. PARRISH. That is considered a part of the record?

The DEPUTY COMMISSIONER. Yes, sir. Would you gentle-
76 men like to write briefs? This is a new point.

Mr. FULTON. We would like to.

Mr. PARRISH. When would they have to be in? I have a lot of court engagements.

The DEPUTY COMMISSIONER. How about the 10th of November?

Mr. PARRISH. Both file briefs by the 10th of November?

The DEPUTY COMMISSIONER. Yes, sir.

Mr. FULTON. I have some matters that will take me out of town some. I would like to have his brief first.

The hearing was thereupon concluded.

[Reporter's certificate to foregoing transcript omitted in printing.]

78 *Claimant's Exhibit 1*

Form U. S. 264

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION	Leave this space blank.
Office of Deputy Commissioner .... Administering Longshoremen's and Harbor Workers' Compensation Act	Case No. 25-1. Insurance Carrier's No. None.

PROOF OF DEATH

(By Physician Last in Attendance on Deceased)

NOTE.—Verification of this report may make it unnecessary for the physician making the same to attend hearing as a witness.

1. Name of the deceased in full, George Percell Armistead, Jr. Address, 22 E. Hill St., Richmond, Va.

2. Age at death, 24 years. Married or single? Married.

3. Name of employer, Motor Boat Sales, Inc. Address, 3 W. Grace St., Richmond, Va.

4. How long have you been medical adviser of deceased?

5. Date of accident or first illness, August 8, 1938. Date of death, August 8, 1938.

6. Date of your first visit ..... 192.. Date of last visit ..... 192..

7. Place of death (give street number, city or town, and state), James River, at Richmond, Va.

8. Who engaged your services? City Coroner.

9. State in patient's own words how accident occurred or occupational disease was caused:

10. Give a complete and accurate description of nature and extent of injury or occupational disease, as you found it upon first and subsequent examinations: Drowned accidentally while riding in motorboat which overturned.

11. State the direct cause of death: Drowning.

(Let your answer be explicit and complete)

12. In your opinion, was the accident or occupational disease as above described a cause either directly or indirectly of the death?

13. Give contributory causes, if any:

14. If coroner's inquest held, give coroner's name and address: Dr. George Williams, Richmond, Va.

15. Was deceased attended by any other physician during last illness? If so, name and address:

16. I am a physician duly licensed in the State of Virginia, and graduated in the year 1931 from University of Colorado Medical College.

(Sgd.) GEORGE Z. WILLIAMS,
Coroner, Attending Physician,
Address, Richmond, Va.

Dated October 20, 1938.

79 STATE OF VIRGINIA,
City of Richmond, ss:

George Zeer (?) Williams, being duly sworn, deposes and says: That he is the physician who subscribed to the above (or attached) report; that he has read the same and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 20th day of October 1938.

[SEAL] (Sgd.) ELINOR I. JOHNSON,
Notary Public.

My commission expires January 21, 1941.

This blank must be signed personally by the attending physician or in hospital cases personally by the superintendent.

IMPORTANT.—All questions to be fully answered. 9-1231. U. S. Government Printing Office.

80 *Exhibit B*

(NOTE.—For Exhibit B, filed March 29th, 1940, in the hearing before the United States District Court, see page 9.)

81 In United States District Court

No. 1507-M

MOTOR BOAT SALES, INCORPORATED

vs.

E. V. PARKER, DEPUTY COMMISSIONER, and JESSIE BOOKER ARMISTEAD AND OTHERS

Memorandum by the Court

Filed June 11, 1940

This is a suit to review an award of compensation made under the Longshoremen's & Harborworkers' Compensation Act, Title 33, Sections 901-950, U. S. C. A. George P. Armistead, Jr., an employee of Motor Boat Sales, Incorporated, was drowned in James River at Richmond, Virginia, on August 8, 1938. Jessie Booker Armistead, widow of George P. Armistead, Jr., filed a claim with the United States Employees' Compensation Commission against Motor Boat Sales, Incorporated, asking for an award of compensation under the said Act. A hearing was had before a Deputy Commissioner for the Fifth Compensation District, who made findings of fact and an award of compensation to the claimant and her dependents. This suit was then instituted pursuant to Section 921 to permanently enjoin the said award. By order of Court the claimants before the Deputy Commissioner were allowed to intervene.

The Act affords compensation to certain marine workers "for accidental injury or death arising out of or in the course of the employment." The Act provides that the term "employer" includes "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

The complainant alleges many grounds why the award should be permanently enjoined. Some of these grounds were not raised before the Deputy Commissioner, and many of them do not merit serious consideration and were actually abandoned at the hearing before the Court.

The constitutionality of the Act is questioned. The Act was held to be constitutional by the Supreme Court of the

82 United States in the case of Crowell v. Benson, 285 U. S. 22.

Section 903a of the Act provides that compensation may be awarded only if the accident occurred upon navigable waters of the United States and if recovery through workmen's compensation proceedings may not validly be provided by state law. It is not denied that the accident occurred upon navigable waters of the United States, and it would seem that the Virginia Workmen's Compensation Act is not and could not be made applicable to a case such as this. See Southern Pacific Company v. Jenson, 244 U. S. 205; Noguira v. New York, New Haven and Hartford Company, 281 U. S. 138; Johnson v. Elliott, 152 Va. 121; and the documents of the Industrial Commission of Virginia in Irwin v. Friend & Company, 12 O. I. C. 490.

It is contended that the compensation order, findings of the Deputy Commissioner and award are not in accordance with law. The proceedings of the Deputy Commissioner conformed to the statute. Congress has power to invest the Deputy Commissioner with authority to determine whether the death arose out of and in the course of the employment, and when the Deputy Commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by the evidence are deemed to be conclusive. Doehl v. Indemnity Insurance Company, 288 U. S. 162.

But it is contended that the finding of the Deputy Commissioner that there existed the employer-employee relation necessary for an award under the Act is without evidence to support it. It is not denied that there existed between the complainant and Armistead the ordinary relation of master and servant, but it is contended that the death of Armistead did not arise out of or in the course of the employment and that the complainant was not an employer any of whose employees were employed in maritime employment, in whole or in part. I think that the finding of the Deputy Commissioner on these points is supported by the proofs. In this connection the name of the complainant company and the very nature of its business are significant. Not only

83 is the company engaged in the business of selling boats, motors, and marine supplies, but it also serviced and demonstrated its boats and motors on navigable waters, and its employees also operated its boats for long trial trips before they were sold. It is true that Armistead was employed as a janitor and handyman in the store and that while working there he took his orders from Mr. Todd. However, when performing services outside the store Armistead was subject to the orders of the white employee he was assisting. On one occasion in question he was sent to the river with Cooper with instructions to help Cooper

and while there was subject to the orders of Cooper. The object of the trip to the river was to demonstrate for the purpose of making sale thereof a motor belonging to the company. After helping Cooper to attach the motor to the boat and to connect the batteries, Armistead went with Cooper on a trip "to try the motor out and to see how it operated." While Cooper did not order Armistead to go with him on the trial trip, Armistead was in the boat with the consent and approval of Cooper who for the time being was his boss. And at the very moment that the boat capsized Armistead was keeping a lookout for Cooper who was operating the boat. Under such circumstances it cannot be successfully contended that Armistead's death did not arise out of or in the course of work he was employed by the company to perform or that the company was not an employer any of whose employees were employed in maritime employment.

An order refusing to enjoin the award and dismissing the complaint may be presented after notice.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

JUNE 11, 1940.

84 In United States District Court

Motion of plaintiff for leave to reargue case, etc.

Filed June 24, 1940

This day comes the plaintiff, Motor Boat Sales, Incorporated, and moves the Court to be allowed to reargue the above cause and for a rehearing of the same, on the grounds and for the reasons:

1. That the Longshoremen's and Harbor Workers' Act has two fundamental limitations:

(1) It deals exclusively with compensation in respect to disability or death resulting from an injury occurring upon navigable waters of the United States, if recovery through workmen's compensation proceedings may not validly be provided by state law; and

(2) It applies only when the accidental injury or death arises out of and in the course of employment of the employee in maritime employment, in whole or part, upon such navigable waters, and the Act as construed in this case by the District Court is in violation of the Constitution of the United States in that it holds that the Congress may substitute for Constitutional courts, in which the judicial power of the United States is vested, an administrative agent, namely, a single Deputy Commissioner, for the final determination of the existence of facts upon which the enforcement of

the Constitutional rights of the plaintiff depend, and in that it holds that there is no limitation of such Deputy Commissioner's power to determine the fundamental facts and thus oust the Court of the determination of such facts by vesting the authority to make them with finality in such Deputy Commissioner or administrative agency, thereby destroying the judicial power as it exists under the Federal Constitution and makes the findings of such agencies in effect finality as to law.

85 (3) That the findings of the Deputy Commissioner are not in accordance with law and are not supported by the evidence and are without evidence to support them, as appears from the record, and that this Court has erred in deeming such findings conclusive under the facts and law in this cause—all the uncontradicted evidence showing that George P. Armistead, Jr., the decedent's, injury and death did not arise out of and in the course of his employment, and that he was not employed to work upon navigable waters of the United States and that his employment was not of a maritime character, and at the time he was drowned he was not performing any duties he had been employed or directed to do, and that the matter of his death was local and not related to navigation or commerce, and the relation of master and servant did not exist pro haec death; and

(4) That the death of George P. Armistead, Jr., did not fall within the coverage of the Longshoremen's and Harbor Workers' Act; that there was no basis for such recovery under said Act and in admiralty.

For the above and other reasons appearing in the Bill of Complaint and Record, the plaintiff moves the Court to be allowed to reargue the above cause and for a rehearing of the same.

This June 24, 1940.

MOTOR BOAT SALES, INCORPORATED,
By (Sgd.) M. J. FULTON,
M. J. Fulton,
Its Counsel.

86 In United States District Court

[Title omitted.]

Order refusing reargument, etc.

Entered and filed June 24, 1940

This day came the plaintiff, Motor Boat Sales, Incorporated, and moved the Court to be allowed to reargue the above cause for reasons set forth in writing and hereby filed.

It appearing that the grounds and reasons for the motion to reargue its said cause have heretofore been argued and considered by the Court, the motion to reargue is hereby overruled and denied, to which action of the Court the complainant, by counsel, excepted.

(Sgd.) ROBT. N. POLLARD.
United States District Judge.

JUNE 24, 1940.

87 In United States District Court

Miscellaneous No. 1507

MOTOR BOAT SALES, INCORPORATED, COMPLAINANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, and JESSIE BOOKER ARMISTEAD ET AL., DEFENDANTS

Final decree

Entered and filed June 25, 1940

This cause came on this day to be heard on the bill of complaint, the motion to dismiss and the answer of the defendant, E. V. Parker, Deputy Commissioner, and on the petition, the motion to dismiss and the answer of Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead, III, and William Berkley Armistead, they having intervened in this cause as parties defendant by leave of Court, and on the motion to dismiss and answer of Aubrey N. Heflin, guardian ad litem for the said infant defendant, and on the award of E. V. Parker, Deputy Commissioner, rendered in this matter, and on the transcript of the evidence and the record of the hearing before the said Deputy Commissioner, and exhibits filed therewith, said award and transcript of the hearing having been filed with the answer of the said E. V. Parker, Deputy Commissioner, and was argued by counsel:

And the Court being of opinion that The Longshoremen's and Harbor Workers' Compensation Act, under which this proceeding was instituted as an equity suit, is a part of the maritime law of the United States, and that the jurisdiction conferred on the Courts of the United States by said Act is admiralty jurisdiction, it is now ordered that this cause be henceforth proceeded with as an admiralty cause, and that the pleadings heretofore filed by the several parties under the designations applied to such pleadings in an equity suit be treated as pleadings filed by the several parties under the designations applied to pleadings in an admiralty cause.

And the Court having maturely considered the matter, and being of opinion for reasons set forth in the Court's memo-
88 randum heretofore filed in this cause and hereby made a part of the record, that the jurisdiction of the Commissioner and the award made by him in this matter are supported by the evidence and are in accordance with law,

It is adjudged, ordered, and decreed that the libel herein be, and it is hereby, dismissed, at the cost of the libelant, to which action of the Court in dismissing the libel, the libelant, by proctor, objected and excepted.

And it further appearing to the Court that the respondent, Jessie Booker Armistead, has filed in writing her consent to the allowance of an additional fee of Two Hundred and Fifty ($250.00) Dollars to the firm of Parrish, Butcher and Parrish, for services rendered Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkeley Armistead in this suit, and that the said Aubrey N. Heflin, guardian ad litem of the infant respondents, Dorothy Marian Armistead, George Percell Armistead III, and William Berkeley Armistead, has committed the interests of the said infant respondents to the Court in respect to the allowance of proctor fees, and it appearing to the Court that a fee of Two Hundred and Fifty ($250.00) Dollars for the services of Messrs. Parrish, Butcher and Parrish in this Court is reasonable, the same is hereby approved and confirmed, and it is adjudged, ordered, and decreed that the allowance of the additional sum of Two Hundred and Fifty ($250.00) Dollars shall be a lien upon the award of compensation.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

JUNE 25, 1940.

Due service and receipt of a copy of the within proposed final decree is hereby admitted this 24th day of June 1940.

(Sgd.) M. J. FULTON,
Proctor for Libelant.

89 RICHMOND, VIRGINIA,
June 15, 1940.

MR. R. R. PARRISH,
c/o Parrish, Butcher & Parrish, Richmond, Virginia.

DEAR MR. PARRISH: Following your discussion with me of the amount of fee to be allowed you for representing me and the infant dependents of my deceased husband, George Armistead, Jr., I wish to advise that the allowance of a fee of $250.00 to you by the Court will be satisfactory to me. I understand that the amount of fee to be allowed you is in the discretion of the Court,

and that if I had any objection to the amount I would have the right to appear before the Court and state my objections. Under all of the circumstances, I think such an allowance for services rendered me and my children would be reasonable. It is satisfactory to attach this agreement to any decree or judgment which may be entered by the Court evidencing my approval.

Very truly yours,

325 (Sgd.) JESSIE ARMISTEAD.

90 In United States District Court

Petition for appeal

Filed July 8, 1940

The petitioner, Motor Boat Sales, Incorporated, hereinafter referred to as complainant, by S. King Fulton, its President, respectfully represents:

1. That it is a corporation organized under the laws of the State of Virginia, and duly authorized and licensed to transact business in said State of Virginia, which is within the jurisdiction of the District Court of the United States for the Eastern District of Virginia; and that it has authorized the taking of this appeal:

2. That the defendant, E. V. Parker, is Deputy Commissioner for the Fifth Compensation District of the United States;

3. That the complainant herein was defendant in proceedings before said Deputy Commissioner in a claim for compensation made against it on behalf of Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead, the alleged dependents of George P. Armistead, Jr., deceased;

4. After the claim was duly filed by the alleged dependents of said George P. Armistead, Jr., with the defendant, E. V. Parker, Deputy Commissioner, and the complainant therein, made answer and defense thereto, the defendant, E. V. Parker, Deputy Commissioner, held a hearing thereon and, after duly swearing the witnesses, heard their testimony on January 17th, 1940, and the said defendant, E. V. Parker, Deputy Commissioner, on January 17, 1940, made certain findings of fact and entered an order on the complainant herein to pay compensation, under the Longshoremen's and Harbor Workers' Compensation Act;

5. That thereafter the complainant therein filed a Bill of Complaint in the above Court asking that the action of
91 said Deputy Commissioner, E. V. Parker, be reviewed for the matters and reasons therein set forth, and that he be enjoined from enforcing said order, and to set aside certain findings of fact therein mentioned:

6. That a motion to dismiss and an answer to said Bill of Complaint were filed by the defendant, E. V. Parker, Deputy Commissioner; the dependents of George F. Armistead, Jr., deceased, filed a petition and by leave of Court were made party defendants to said Bill of Complaint, and after a hearing upon the evidence and record introduced before the said Deputy Commissioner and after argument thereon the above Court, through Robert N. Pollard, U. S. District Judge, filed an opinion in which it was indicated that a decree dismissing the Bill of Complaint could be submitted. The Court thereupon transferred the cause to the admiralty side of the Court:

7. That thereafter the complainant, after leave of Court, filed a motion for leave to reargue the above cause, which motion for reargument came up for hearing in due course, and after consideration by the Court was dismissed, to which action of the District Court complainant excepted, and the Court, through Robert N. Pollard, Judge, filed an opinion in which it was indicated that a decree dismissing the decree could be submitted and would be filed for the reasons set forth therein, which opinions have since been made a part of the record:

8. Thereafter, in conformity with the opinion of the Court referred to, a decree dismissing the Bill of Complaint has been entered, to which complainant objected and excepted:

9. That petitioner, above-named complainant, conceiving itself aggrieved by the refusal of the above Court to grant the prayer of the said Bill of Complaint and by the entry of the decree dismissing the same made and entered on June 25th, 1940, and that an injustice has been done it, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignments of error attached hereto and filed herewith, and pray that the
92 appeal may be allowed, and that a supersedeas be allowed and an injunction be granted enjoining defendant, E. V. Parker, Deputy Commissioner, from issuing, recording, or collecting said award pending this appeal upon the filing of good and sufficient security for costs and to abide and perform whatever decree may be entered in the cause by the Circuit Court of Appeals or to its mandate to the District Court.

And petitioner will ever pray.

MOTOR BOAT SALES, INCORPORATED.
By (Sgd.) S. KING FULTON,
S. King Fulton, *President*.
(Sgd.) M. J. FULTON,
M. J. Fulton, *Proctor*.

[*Duly sworn to by George W. Todd; jurat omitted in printing.*]

93 In United States District Court

[Title omitted.]

Order allowing appeal

Entered and filed July 8, 1940

The foregoing appeal is allowed to the Circuit Court of Appeals for the Fourth Circuit.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

JULY 8, 1940.

In United States District Court

Assignments of error

Filed July 8, 1940

Motor Boat Sales, Incorporated, petitioner libelant in the above-styled cause, hereby assigns, in connection with its petition for appeal, the following errors:

1. The Court erred in refusing to enjoin the award and dismissing the Bill of Complaint herein and in affirming the award of the Deputy Commissioner, E. V. Parker, and in entering judgment thereon against petitioner-libelant.

2. The Court erred in holding that the claim of respondents-claimants for compensation for the death of George P. Armistead, Jr., "may not validly be provided for by state law."

3. The Court erred in holding that the award herein for compensation to claimants for the death of George P. Armistead, Jr., falls exclusively within the coverage of the Longshoremen's and Harbor Workers' Act, and that the District Court and the Deputy Commissioner had jurisdiction to make such award under said Act.

4. The Court erred in holding that the death of George P. Armistead, Jr., upon whose death the award for compensation was made to respondents, "arose out of and in the course of his employment in maritime, in whole or part, upon the navigable waters of the United States."

94 5. The Court erred in holding that the findings of the Deputy Commissioner were in accordance with law, and were supported by evidence.

6. The Court erred in holding that the findings of the Deputy Commissioner, E. V. Parker, are conclusive and final under the facts and law in this cause and that compensation for the death of George P. Armistead, Jr., may be validly provided under the Longshoremen's and Harbor Workers' Act.

7. The Court erred in holding that the injury and death of George P. Armistead, Jr., was not of a local character, but was maritime, and related to navigation or commerce, and that the relation of master and servant existed between this petitioner-libelant and George P. Armistead, Jr., decedent, at the time of his injury pro haec his injury and death.

8. The Court erred in holding that this petitioner-libelant was guilty of any act resulting in the death of George P. Armistead, Jr., decedent, and was liable for the compensation awarded to claimants.

9. The Court erred in holding that the Longshoremen's and Harbor Workers' Act, as construed in this cause, is not in violation of the Constitution of the United States, in that it holds that the Congress of the United States by such Act may substitute for the constitutional Courts of the United States, in which the judicial power is vested, an administrative agent, namely a single Deputy Commissioner, for the final determination of the existence of facts upon which the enforcement of the constitutional rights of petitioner-libelant depend, and in that it holds that there is no limitation of such Deputy Commissioner's power to determine these fundamental facts, and that such administrative agent has the sole power to determine if recovery through workmen's compensation proceedings may not be validly provided by state law, and thus ousts the Federal Courts of the determination of such facts and law by vesting the sole authority to make them with finality in such Deputy Commissioner or administrative agency, thereby destroying the judicial power as it exists in the Federal Courts under the Constitution of the United States and makes the finding of such an agency in effect finality as to law.

10. The Court erred in holding that the vessel or motor row boat which George P. Armistead, Jr., was in at the time of his death was a vessel within the coverage of the Longshoremen's and Harbor Workers' Act.

11. The Court's judgment is without evidence to support it and is contrary to law and the evidence.

And for other errors that may be hereafter assigned.

Wherefore, petitioner, Motor Boat Sales, Incorporated, prays that judgment entered herein may be reversed and annulled.

(Sgd.) M. J. FULTON,
M. J. Fulton,
Proctor for Petitioner-Libelant.

JULY 8TH, 1940.

95 In United States District Court

Clerk's memorandum

Appeal bond

Cash bond of Sixteen Hundred Dollars ($1,600.00) deposited with Clerk on July 22nd, 1940, and subsequently deposited in the registery of the Court.

Citation

Issued July 9th, 1940

MARSHAL'S RETURN

I certify that on the 12th day of July 1940 I served a copy of the within citation on E. V. Parker, and at the same time handed him a copy of the Order Granting Injunction Pending Appeal, in person, at Norfolk, Va., a place within my District.

(Sgd.) R. L. AILWORTH,
United States Marshal.
By (Sgd.) H. W. FURLOW,
H. W. Furlow,
Deputy U. S. Marshal.

96 In United States District Court

Stipulation as to omission of certain pleadings in record on appeal

Filed July 8, 1940

It is hereby stipulated and agreed by and between the parties hereto, by their proctors:

That the Respondents, Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley

Armistead, by leave of Court filed their petition for leave to intervene as parties respondent in this suit; that this Court after the issuance and service of a Show Cause Order, as prayed for in the said petition, in due course allowed the respondents above named in this stipulation to enter their appearance as parties respondent in this matter; that by like leave of Court the said intervening respondents adopted the grounds of the motion to dismiss and of the answer heretofore filed by the respondent, E. V. Parker, Deputy Commissioner, as the grounds of their motion to dismiss and answer; that this Court in due course appointed Aubrey N. Heflin, a discreet and competent attorney at law guardian ad litem for the infant respondents, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead; that by leave of Court, the said Aubrey N. Heflin, guardian ad litem for the above named infant respondents, adopted the grounds of the motion to dismiss and of the answer heretofore filed by the respondent, E. V. Parker, Deputy Commissioner, as the grounds of his motion to dismiss and answer, as guardian ad litem on behalf of the said infant respondents.

It is further stipulated and agreed by and between the parties hereto, by their proctors, that pursuant to Admiralty Rule No. 49, the Clerk of this Court shall omit from the record on Appeal herein the following pleadings:

1. Petition of Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William
97 Berkley Armistead for leave to intervene as parties respondent, filed herein on April 10, 1940;

2. Show cause order on intervening petition, entered herein on April 10, 1940;

3. Order allowing intervention, entered herein on May 16, 1940;

4. Order appointing guardian ad litem for infant defendants, entered herein on May 16, 1940;

5. Order extending time for filing answer by E. V. Parker, Deputy Commissioner, entered herein on February 28, 1940;

6. Order granting injunction pending appeal, entered herein on July 9th, 1940;

And that the Clerk of this Court, in lieu of the pleadings referred to immediately above, shall include in the Record on Appeal a copy of this stipulation.

(Sgd.) M. J. FULTON,
Proctor for libelant,
Motor Boat Sales, Incorporated.
(Sgd.) JNO. V. COGBILL,
Asst. U. S. Atty.
Proctor for respondents.
E. V. PARKER,
Deputy Commissioner.
(Sgd.) R. R. PARRISH,
Proctor for intervening respondents, Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead.

JULY 8th, 1940.

98 In United States District Court

Stipulation of proctors as to what shall constitute the record on appeal

Filed July 10, 1940

[Title of Court and style of case omitted.]

To the Clerk of the said Court:

It is hereby stipulated and agreed by and between the parties hereto, by their proctors, that the Record on Appeal herein shall be comprised of the following:

1. Bill of Complaint, filed herein on February 9, 1940.
2. Motion to Dismiss, filed herein by E. V. Parker, Deputy Commissioner, on March 28, 1940.
3. Order filing answer of E. V. Parker, Deputy Commissioner, entered herein on March 29, 1940.
4. Answer of E. V. Parker, Deputy Commissioner, filed herein on March 29, 1940.
5. Transcript of the evidence and the record of the hearing before E. V. Parker, Deputy Commissioner (with exhibits filed therewith), filed herein on March 29, 1940, and marked "Exhibit A"; Findings of Fact and Award of E. V. Parker, Deputy Commissioner, filed herein on March 29, 1940, and marked "Exhibit B."
6. Memorandum by the Court, dated June 11, 1940.
7. Motion of plaintiff for leave to reargue and rehear the above cause, filed herein on June 24, 1940.

8. Order of Court overruling motion to reargue, entered herein on June 24, 1940.

9. Final Decree, entered herein on June 25, 1940.

10. Notice of Appeal, filed herein on July 8, 1940.

11. Petition to allow appeal; order of Court allowing appeal, entered on July 8, 1940.

12. Libelant's assignments of error, dated July 8, 1940.

99 13. Citation, issued by this Court on July 9, 1940.

14. Stipulation of proctors as to the omission of certain pleadings in the record on appeal, dated July 8, 1940.

15. This stipulation, filed herein on July 10, 1940.

16. Certificate of the Clerk.

(Sgd.) M. J. FULTON,
Proctor for Libelant,
Motor Boat Sales, Incorporated.
(Sgd.) JNO. V. COGBILL,
Asst. U. S. Atty.,
Proctor for Respondent,
E. V. PARKER,
Deputy Commissioner.
(Sgd.) R. R. PARRISH,
Proctor for Intervening Respondents, Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead, III, and William Berkley Armistead.

JULY 10, 1940.

100 [Clerk's certificate to foregoing transcript omitted in printing.]

101 In United States Circuit Court of Appeals

For the Fourth Circuit

No. 4693

MOTOR BOAT SALES, INCORPORATED, APPELLANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, AND JESSIE BOOKER ARMISTEAD, ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

Docket entries

August 16, 1940, the transcript of record is filed and the cause docketed.

Same day, original citation is certified up.

August 20, 1940, the appearance of R. R. Parrish and Thos. C. Gordon, Jr., is entered for the appellees Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead.

Same day, the appearance of M. J. Fulton is entered for the appellant.

August 21, 1940, the appearance of John V. Cogbill, Assistant U. S. Attorney, and H. H. Holt, Jr., Special Assistant to the U. S. Attorney, is entered for the appellees.

September 17, 1940, brief and appendix on behalf of appellant are filed.

October 3, 1940, brief and appendix on behalf of appellees are filed.

October 21, 1940, reply brief on behalf of appellant is filed.

October 23, 1940, cause continued, in Open Court, to the November term, 1940.

102 ARGUMENT OF CAUSE

November 23, 1940 (November term, 1940), cause came on to be heard before Parker and Dobie, Circuit Judges, and Chesnut, District Judge, and was argued by counsel and submitted.

103 In United States Circuit Court of Appeals, Fourth Circuit

No. 4693

MOTOR BOAT SALES, INCORPORATED, APPELLANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, AND JESSIE BOOKER ARMISTEAD ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. In Admiralty

(Argued November 23, 1940. Decided January 6, 1941)

Before PARKER and DOBIE, Circuit Judges, and CHESNUT, District Judge

M. J. Fulton, for Appellant, and Robert R. Parrish and Harry H. Holt, Jr., Special Assistant to U. S. Attorney (Sterling Hutcheson, U. S. Attorney; John V. Cogbill, Assistant U. S. Attorney; T. C. Gordon, Jr., and Parrish, Butcher & Parrish, on brief), for Appellees.

Opinion

Filed January 6, 1941

104 DOBIE, Circuit Judge: George Armistead, Jr. (hereinafter called Armistead), an employee of Motor Boat Sales, Incorporated (hereinafter called the Boat Corporation), was drowned when a motorboat in which he was riding was overturned on the James River. Armistead's widow and minor children filed a claim against the Boat Corporation under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901-950), hereinafter called the Act. E. V. Parker, Deputy Commissioner for the Fifth Compensation District of the United States Employees' Compensation Commission (hereinafter called the Deputy Commissioner), made an award in favor of the claimants and against the Boat Corporation. Thereupon the Boat Corporation instituted an action, under the terms of the Act, in the United States District Court for the Eastern District of Virginia, to review, set aside, and enjoin the Deputy Commissioner's award. The District Court, by a final decree, sustained the award of the Deputy Commissioner and dismissed the Boat Corporation's complaint. This appeal was duly taken from that decree.

Armistead was employed by the Boat Corporation as a janitor, porter, or handyman at its store, # 3 West Grace Street, in the City of Richmond, Virginia. His duties appear to have been of the general character usually involved in such a job. He had no specialized knowledge about boats or motors. The Boat Corporation was engaged in selling small boats, outboard motors, and maritime supplies needed in the types of boats it sold. The Boat Corporation did not service boats and did not do repair work on boats, engines, or motors upon navigable waters. The boats it sold were fully equipped and ready for service. Unlike the situation as to automobiles, it was not customary for the Boat Corporation to demonstrate on navigable waters the boats that it had for sale; for in this type of business it seems that a boat,
105 when once placed in the water and run, becomes, for trade purposes, a second-hand boat. On occasions, employees were sent, in the performance of their duties, upon navigable waters, but these occasions were rather few and somewhat far-between. The testimony is clear that Armistead had been repeatedly and specifically cautioned and instructed that he was not to get on boats, ride in boats, or perform any services on navigable waters.

On August 8, 1938, the day on which Armistead was drowned, a Mr. Crown and his brother came by the store of the Boat Corporation with a fifteen-foot rowboat. The Crowns talked with Mr. Hobbs and Mr. Lloyd, Assistant Managers of the Boat Corpora-

tion, about the purchase of a second-hand outboard motor for this boat, and two particular motors were examined by the Crowns, with the idea that one of these might be purchased. It was decided that these two motors would be sent down to the James River to be attached to the boat and to be tested and operated. Both Johnnie Cooper (hereinafter called Cooper), a mechanic's helper of the Boat Corporation, and Armistead went with the motors.

The testimony is not altogether clear as to just what instructions were given by the officers of the Boat Corporation as to Armistead's duties. It seems, though, that these instructions contemplated that Armistead was to go along as a strong-arm man to help lift the motors from the car to the boat on the river and, after the motors had been tested, to help in lifting the motors back from the boat to the car. It would, of course, have been the mark of wisdom for the officers of the Boat Corporation to caution Armistead then and there against going out on the James River in the boat. This was not done. These officers testified, however, that though they said nothing on this particular occasion about Armistead going out on the river in the boat, Armistead had been previously given specific warning against going out on boats; and that they, therefore, fully contemplated that he would not
106 go out on the river in the boat, but would stay on shore and limit his activities solely to such efforts as were necessary to carry the motors to and from the boat. The testimony shows that Armistead had never before been sent by the Boat Corporation on any work that might take him upon navigable waters. There was testimony that Armistead had once acted as watchman on a boat; but this was an undertaking completely on his own, outside of his hours of work and not on behalf of the Boat Corporation.

When the party, on the day in question, reached the shore of the James River, one of the outboard motors was, with the assistance of Armistead, attached to the boat and a trip on the James River was begun. Armistead got in the boat with the others and made this trip. No one either specifically told him to go in the boat or impliedly encouraged him to do so. However, it is equally clear that before he got in the boat, no one told him not to get in, and that, after he had taken his place, no one told him to get out of the boat.

After this first trip was completed, when one of the outboard motors had been tested on the boat, the two Crowns stated that they had an engagement and left. Thereupon, with Armistead's aid, the first outboard motor was removed from the boat and the second outboard motor was attached. Armistead again got in the boat and the ill-fated second trip was begun. Cooper occupied the stern of the boat, operating and navigating the boat, while Armistead sat in the bow. On this second trip, again Armistead was not

asked to get in the boat; again no one forbade him to get in, and no one later asked him to get out of the boat. Cooper testified that he gave Armistead no instructions as to any duty that Armistead was to perform on his ill-fated trip; but Cooper testified further that Armistead did act as lookout on this trip. The boat struck some obstruction, was capsized, and Armistead was drowned.

Some questions of administrative procedure under the Act
107 are involved in this appeal. We shall confine ourselves, however, to a discussion of the single question of whether or not Armistead's employment brought him within the ambit of the Act. As to that inquiry, we think that the answer must be in the negative and that, in the light of this answer, the judgment of the District Court must be reversed.

The federal Longshoremen's and Harbor Workers' Act of 1927 was enacted, with the New York State Compensation Act as a model, to set up a compensation scheme for injury or death on navigable waters, provided that no recovery could be had under state laws, by reason of the maritime character of the employment of the person who was killed or injured. The history of the Act is outlined by Chief Justice Hughes in Nogueira v. N. Y. etc. Ry. Co., 281 U. S. at p. 136, 50 S. Ct. at p. 375; while many of its provisions are sketched by the Chief Justice in the leading case of Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285. The Act is admirably discussed, with ample citation of authorities, in Robinson on Admiralty, pages 109–133. As we interpret the Act, it was designed to cover a gap between the real seamen and sailors—"seafaring men with sad, sea-weary eyes"—on the one hand, and the landlubbers, whose labors never took them upon the bounding deep, on the other hand. Between these two classes was a large group of laborers whose tasks have been called amphibious—a part of their work was on the land, another part was on navigable waters. These were the longshoremen and harbor workers. For them a federal compensation act seemed fair; so Congress enacted this statute.

The Act applies "only if the disability or death results from an injury occurring upon the navigable waters of the United States" (Act, Section 2 (a)). There seems to be no question that this requisite was completely fulfilled in the instant case. Clearly, too, the employer-employee relation, another requisite of liability, existed between Armistead and the Boat Corporation at the time of Armistead's death.

108 This same section of the Act also permits recovery under the Act "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." And under Section 2 (4), we find: "The term 'employer' means an employer, any of whose employees are em-

ployed in maritime employment, in whole or in part, upon navigable waters of the United States." Sections 2 and 3 of the Act are the nub of this case. "Maritime employment" under the Act excludes matters that are purely "local." Thus, in 2 Corp. Jur. Sec. at p. 132, we find:

"Under the Federal Compensation Act, providing that compensation shall be payable only if recovery may not validly be provided by state law, an injury received in an employment, although maritime, pertaining to local matters, and having only an incidental relation to navigation and commerce, is subject to the application of the local compensation act and without the scope of the federal act."

It is not necessary here for us to discuss in detail the well-known hair-line that divides the federal admiralty jurisdiction, on the one hand, from the purely local jurisdiction of the states, on the other hand. Landmarks in this field are Southern Pacific v. Jensen, 244 U. S. 205, 37 S. Ct. 524; Cathelentis v. Luchenbach Steamship Co., 247 U. S. 372, 38 S. Ct. 501; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438; Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 42 S. Ct. 157; Great Lakes Dredge and Dock Co. v. Kierejewski, 261 U. S. 479, 43 S. Ct. 418. We are here concerned with the difficult problem of a specific statutory application of the general rule. Was Armistead engaged in maritime employment at the time of his death so that a recovery may be had under the Act? Or was his employment "not so directly connected with navigation and commerce that to permit the rights of the
109 parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law"? (2 Corp. Jur. Sec. 131).

We are forced to the conclusion that Armistead's employment at the time of his death was strictly local and thus was without the scope of the Act. Though it is by no means conclusive, we think the title of he Act (Longshoremen's and Harbor Workers' Act) is very informative on our problem. Here is a janitor in a city store, who has been forbidden to go out on boats in navigable waters. To call him a harbor worker or a longshoreman would seem to be a misnomer. When he was sent by his employer on the day of his death to the shore of the James River, this, as far as the record discloses, was the only instance when his duties ever brought him into contact with navigable waters.

Counsel for Armistead laid great stress on the fact that Armistead was a colored man, sent to help a white man; that when Armistead took his place in the boat on the first trip, without any objection from Cooper, and when he again, without objection from Cooper, took his place in the boat for the tragic second trip, this extended the scope of his employment; and that, as a result,

Armistead, during the second trip, was actually engaged in maritime employment, as that term is used in the Act. In other connections, and for other purposes, there may well be real force in this argument. Yet, when it is remembered that Armistead had been expressly forbidden by his employers to go on navigable waters in boats, we do not think that Cooper's passive acquiescence (if such it be) has sufficient legal force to bring the death of Armistead under the beneficent terms and scope of the Act. His activities, we believe, were still local, and the control of these activities by state law works no material prejudice to the general maritime law which, in turn, is enforced as a matter of federal concern by the federal courts. We think "the employment * * * pertains to local matters, having only an inci-
110 dental relation to navigation and commerce." Associate Justice VanDevanter, in Sultan Ry. & Timber Co. v. Department of Labor, etc., 277 U. S. 135, 48 S. Ct. 505.

It should be noted here that compensation is payable under the Act if, for the injury or death, a recovery "may not validly be provided by State law," (Act, Section 3 (a)). It is not necessary for the exclusion of the operation of the federal Act that a recovery should be actually available under a state compensation act. This is clearly brought out by the opinion of Circuit Judge Soper in U. S. Casualty Co. v. Taylor, 64 F. (2d) 521, certiorari denied, 290 U. S. 639, 54 S. Ct. 56. The Boat Corporation in our case was not subject to the Virginia Workmen's Compensation Act, because it did not employ the minimum number of employees to bring it under the Virginia statute; but we think that Armistead's employment was so local in character that had the Boat Corporation employed the required number of employees, an action could have been brought under the state statute, and that is determinative. If the state statute can apply, the federal statute cannot.

The cases under the Act defining its scope and application are literally legion. Many of these cases will be found in the state courts, when an attempt was made to bring the injury or death within the provisions of the compensation act of the state in question. These cases, of course, are not all consistent. We think, however, that the cases have worked out a fairly well-defined theory and philosophy of the Act; and, further, we believe, that under this theory and philosophy of the Act, our decision fits with the holdings in the great majority of these cases. These cases do not prick out a clear and clean-cut line of demarcation between maritime employment and employment that is purely local; yet the cases do furnish valuable guides in a field in which we must proceed largely upon intuitions grounded in experience. We shall now proceed to discuss some of the more important of

these cases. It is manifestly impracticable even to cite all of them.

111 First, we shall consider the cases in which the employment was held to be maritime, not local. One of the best considered opinions in all the books, fortified by an ample citation and discussion of the authorities, is St. John v. Thomson, 108 Vt. 66, 182 A. 196, and note in (1936) 22 Va. Law Rev. 822. St. John was employed to go with his employers to a summer resort on Lake Champlain, where he was to work on land, and was also to do what was required of him with regard to a motorboat that was to be operated on Lake Champlain. The motorboat became disabled on Lake Champlain and a rowboat was procured and moored to the motorboat. In some way, this mooring was unloosened and the rowboat drifted away from the motorboat. St. John dove overboard, in an attempt to retrieve the rowboat, and was drowned. The Vermont court held that St. John's employment was maritime and that he could not recover under the Vermont Workmen's Compensation Act. It was expressly stated in this case that since the accident happened on navigable waters, the mere fact that the major portion of St. John's employment was upon land was unimportant; but this was only following Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88. This leading case, we think, can easily be distinguished from our case. An appreciable part of St. John's employment must necessarily have been on navigable waters in the motorboat. In the instant case, however, Armistead was hired as a janitor and cautioned never to go on navigable waters.

The employment was held to be maritime in Mangieri v. Stephens, 232 N. Y. 596, 134 N. E. 586, where the employee was a laborer for a wholesale coal dealer and he slipped and fell into the water while he was pulling a coal boat to the dock. The same result was reached in Doey v. Clarence P. Howland Co., 224 N. Y. 30, 120 N. E. 53, when a carpenter was hurt while making repairs on a steamship; and in Keator v. Rock Plaster Mfg. Co., 224 N. Y. 540, 120 N. E. 56, certiorari denied, 248 U. S. 574,

112 when an employee was injured while unloading rock from a vessel. There were like holdings in Wheeler Shipyard Co. v. Lowe, 13 F. Supp. 863, where an employee, a painter and utility man in a shipyard company, was drowned while delivering a motorboat to a customer; in Buren v. Southern Pacific Co., 50 F. (2d) 407, when a brakeman was injured while unloosing brake upon a train which was being ferried across navigable waters; and, also, in Wood Towing Co. v. Parker, 76 F. (2d) 770, when the employee, a carpenter and general utility man for a company which operated tugs and barges, was injured while installing an engine on a motorboat purchased by the employer. Even repair-

ing a completed vessel upon navigable waters has been held to be maritime. Robins Dry Dock Co. v. Dahl, 266 U. S. 449, 45 S. Ct. 157; John Baizley Iron Works v. Span, 281 U. S. 222, 50 S. Ct. 306.

In Independence Indemnity Co. v. Mansfield, 2 S. W. (2d) 547 (Tex. Civ. App. 1928), the employee was cleaning oil tanks on a vessel and this was held to be maritime, even though the general employment of the employee was nonmaritime. A similar result was reached in U. S. Fidelity and Guaranty Co. v. Lawson, 15 F. Supp. 116, when the employee, a carpenter employed by an oil company for such work as he might be called on to do, was injured while he was enlarging the cabin of the private yacht of the president of the company that employed him.

Two other interesting border-line cases, in which the employment was held to be maritime, are worthy of note. In Norton v. Gulf Refining Co., 94 F. (2d) 380, the employee was an oil gauger who had entered on a barge to take samples of her oil cargo. In Moore Ry. Co. v. Pillsbury, 100 F. (2d) 245, the employee was a rigger who ate and slept at home but worked on a launch on which he lost his life.

Now for the cases in which the employment was held to be
113 local rather than maritime. Fairly close to the instant case is Johnson v. Swonder, 84 Ind. App. 155, 150 N. E. 615, in which Chief Justice Nichols said:

"Appellant's decedent had been employed for years by appellee as a helper around a mattress and upholstering manufactory, and incidental to that employment he was sent on the day of the accident to assist in upholstering on a small speed boat used for appellee's business during the week and on Sundays for pleasure. It is well established that generally federal courts have exclusive jurisdiction of admiralty matters, but where, as here, the enforcement of the state statute works no material prejudice to the characteristic features of the general maritime law, nor interferes with the proper harmony or uniformity of that law in its international or interstate relations, the general rule does not apply."

Equally illuminating is Madderns v. Fox Film Corp., 200 N. Y. S. 344, in which a moving-picture actor, while enacting a scene on a boat in navigable waters, tripped and fell into the water. This was held to be local, and the Court said:

"His work on the boat was merely incidental to his general duties as an actor, and had nothing to do with the boat, save to use it as a background for a moving picture, which, except for this simple incident, was produced upon the land."

The employment was held to be merely local in Travelers' Insurance Co. v. Bacon, 30 Ga. App. 728, 119 S. E. 458, where an em-

ployee was to fish in the employer's boat in navigable waters, but always in sight of land, his compensation to be determined by the size of his catch, and he was drowned when he jumped into the water, after an explosion on the boat set fire to his clothes; also in United Dredging Co. v. Industrial Commission, 92 Cal. App. 110, 267 P. 763, where a man, employed as a helper and all-around man on a dredge, was drowned while operating a rowboat used to carry men from the dredge to the shore.

114 Another leading case is In re Herbert, 283 Mass. 348, 186 N. E. 554, and see notes on this case in 4 Detroit Law Rev. 36 and 38 Monthly Labor Rev. 99. Herbert worked on a scow used to ferry garbage to an island about two miles away in Boston Harbor. His job was to sweep the scow after it had been unloaded. He was engaged in this work while the scow was tied up at the island when he fell overboard. Said Chief Justice Rugg:

"It seems to us difficult to conceive of anything more local in its general nature. * * * It does not appear that the deceased had anything directly connected with maritime affairs * * *."

The Supreme Court of Washington has held in two interesting cases that the employment was not maritime. In Dewey Fish Co. v. Department of Labor and Industries, 181 Wash. 95, 42 P. (2d) 1099, note 10 Wash. Law Rev. 165, the employee worked on vessels in the job of driving and capping piles and hanging upon these piles webbing which served as a fish trap. He also helped to service and repair these traps. He lived on the vessel through the fishing season, but the vessel came into a sheltered cove at night. He had nothing to do with operating or navigating the vessel. In Eclipse Mill Co. v. Department of Labor and Industries, 141 Wash. 172, 251 P. 130, the employee worked upon navigable waters in booming and rafting logs preparatory to towing.

In three other cases the local doctrine was applied by state appellate courts. In McLain v. Kansas City Bridge Co., 83 S. W. (2d) 132 (Missouri 1935), the employee was working as a laborer on a pile driver mounted on a boat anchored in the Missouri River, and the general job was that of placing piles in the river to turn the current. Quite similar was Belk v. Massman Construction Co., 133 Neb. 303, 275 N. W. 76, note 17 Neb. Law Rev. 39, in which the employee was hired to fire a boiler used to

115 operate a pile driver on a barge. In Jones v. International Mercantile Marine Co., 252 App. Div. 347, 300 N. Y. S. 238, the employee was a watchman on a vessel which, though out of commission, had not been dismantled and was still seaworthy, and was temporarily laid up until the vessel would be needed later.

Other cases lighting the outer edge of, but held to be within, the local doctrine, were: Wooley v. E. M. Wichert Co., 275 Pa. 167, 118 A. 765, involving a fireman on a derrick boat which was anchored in a harbor and used for excavating purposes; McBride v. Standard Oil Co., 188 N. Y. S. 90, chauffeur of truck sent to a vessel at a wharf to receive merchandise from a vessel; Lumberman's Reciprocal Association v. Adcock, 244 S. W. 645 (Tex. Civ. App. 1922), employee of a lumber company who worked on a raising boat on a navigable stream to raise logs; Bockhop v. Phoenix Transit Co., 97 N. J. 514, 117 A. 624, employee was injured while painting a ferry boat moored to a dock, when ferry boat was struck by a lighter; Sunny Point Packing Co. v. Faigh, 63 F. (2d) 921, watchman on a fishing trap floating on navigable waters.

In South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251, 260, 60 S. Ct. 544, 549, the Supreme Court took care to point out that the Act was applicable to employees whose service was that of a sort performed by longshoremen and harbor workers. And in Sulan Ry. & Timber Co. v. Department of Labor, 277 U. S. 135, 48 S. Ct. 505, it was stated that the Act was not applicable even if the employee's work had some admiralty feature, provided this work had only incidental relation to navigation, so that the rights and duties of employer and employee could properly be regulated by local or state law, without working material prejudice to the characteristic features of the general maritime law.

Armistead's case, we think, differs from the cases discussed above by virtue of the fact that in all of these cases
116 the tasks assigned, and the instructions given to the employee, necessarily involved the presence of the employee on navigable waters. Armistead, however, was a janitor and he had been expressly cautioned by his employers never to go on boats in navigable waters. Any authorization for Armistead's going on the ill-fated boat trip in question, which may be binding upon his employer, can be predicated only upon the theory that Cooper, the mechanic's helper, was a supervisory employee as to Armistead, and that Cooper's negative acquiescence to Armistead's presence in the boat on this trip might bring the making of this trip within the scope of Armistead's employment. Even should this theory be applicable here, we still believe that any admiralty feature of Armistead's employment falls well within the local doctrine, as that doctrine has been expounded and applied by the courts in connection with the Longshoremen's and Harbor Workers' Act. Armistead was not a mechanic; he had no expert knowledge of outboard motors. This record is devoid of any evidence which might show that, when Armistead was sent upon the errand on the day of his death, the officers of the Boat Corporation ever contemplated that he would go out upon the river in the boat owned by the brothers Crown.

Let us suppose that the officers of the Boat Corporation desired to take out insurance, which would fully protect the corporation against any claims for injury or death which might be made against it, arising out of any injury to, or any such death of, its employees. Would it have occurred to its officers, acting carefully and prudently, to take any policy so worded as to include within its coverage a possible claim against the corporation on the part of Armistead, under the Longshoremen's and Harbor Workers' Act? We hardly think so, even though the Boat Corporation employed too few employees to come within the Virginia Workmen's Compensation Act.

117 Since our decision in this case places the death of Armistead beyond the pale of the federal Act, and since the Boat Corporation is not subject to the State Compensation Act, the result we have reached may well seem unfortunate and regrettable. It is our function, however, to interpret and construe statutes, not to make them, and not to extend them beyond what appears to be the legislative intent. We cannot obey the Shakespearian maxim and wrest the law to our authority, even once. The Longshoremen's and Harbor Workers' Act is indeed a remedial statute, enacted to subserve an admirable purpose. It should perforce be construed liberally, even generously; but its provisions should not be so distorted by the courts as to make it a trap for employers.

The judgment of the District Court is reversed and the case is remanded to that court with directions to enter judgment in favor of the plaintiff-appellant, **Motor Boat Sales, Incorporated.**

Reversed.

118 In United States Circuit Court of Appeals, Fourth Circuit

No. 4693

MOTOR BOAT SALES, INCORPORATED, APPELLANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, AND JESSIE BOOKER ARMISTEAD ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia

Decree

Filed and Entered January 6, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, with directions to enter judgment in favor of the appellant Motor Boat Sales, Incorporated, in accordance with the opinion of the Court filed herein.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

JANUARY 6, 1941.

On another day, to wit, February 6, 1941, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Eastern District of Virginia, at Richmond, in due form.

119 In United States Circuit Court of Appeals, Fourth Circuit

January Term, 1941

Order authorizing clerk to use original transcripts of records in making up records for use in the Supreme Court of the United States on applications for writs of certiorari

For reasons appearing to the Court, it is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

JOHN J. PARKER,
Senior Circuit Judge.

A true copy.
Teste:

[SEAL] CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

120 [Clerk's certificate to foregoing transcript omitted in printing.]

303223—41— 6

U. S. GOVERNMENT PRINTING OFFICE 1941

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	11
Appendix	12

CITATIONS

Cases:

Arrow Stevedore Co. v. *Pillsbury*, 88 F. (2d) 446	10
Baizley Iron Wks. v. *Span*, 281 U. S. 222	6, 8
Bull Insular Line, Inc. v. *Schwartz*, 23 F. Supp. 359	7
Candado Stevedoring Corp. v. *Lowe*, 85 F. (2d) 119	10
Capital Transit Co. v. *Hoage*, 84 F. (2d) 235	7
Carlin, P. J. Constr. Co. v. *Heaney*, 299 U. S. 41	8
Crowell v. *Benson*, 285 U. S. 22	10
Lawson v. *Maryland Casualty Co.*, 94 F. (2d) 193	6
Liability Assurance Co. v. *Cook*, 281 U. S. 233	6
London Co. v. *Industrial Comm'n*, 279 U. S. 109	6
Maryland Casualty Co. v. *Cardillo*, 107 F. (2d) 959	7
Matter of Corrina v. *De Barbieri*, 247 N. Y. 357	7
Northern Coal and Dock Co. v. *Strand*, 278 U. S. 142	6, 8
St. John v. *Thomson*, 108 Vt. 66	6
Shields v. *Utah Idaho Cent. R. R. Co.*, 305 U. S. 177	9
Smith & Son v. *Taylor*, 276 U. S. 179	8
South Chicago Coal & Dock Co. v. *Bassett*, 309 U. S. 251	7, 8
Sultan Ry. & Timber Co. v. *Department of Labor*, 277 U. S. 135	6
Wheeler Shipyard, Inc. v. *Lowe*, 13 F. Supp. 863, affirmed, 82 F. (2d) 1022	6
Wood Towing Corporation v. *Parker*, 76 F. (2d) 770	6
Voehl v. *Indemnity Ins. Co.*, 288 U. S. 162	7, 9

Statute:

Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C., secs. 902 (2), (4), 903, 905, 921 (b)):

305971—41

Statue—Continued. Page
Longshoremen's and Harbor Workers' Compensation Act, etc.—Continued.
Sec. 2 (2) 9, 12
Sec. 2 (4) 12
Sec. 3 (a) 6, 12
Sec. 5 12
Sec. 14 (b) 10
Sec. 14 (f) 10
Sec. 15 (b) 10
Sec. 16 10
Sec. 18 10
Sec. 19 (a) 13
Sec. 21 (b) 10, 13

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in this case on January 6, 1941.

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the Eastern District of Virginia (R. 54) is not reported. The opinion of

the Circuit Court of Appeals (R. 69) is reported in 116 F. (2d) 789.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 6, 1941 (R. 78–79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in an action under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act to enjoin and set aside an award of compensation, a finding of the Deputy Commissioner that the decedent was engaged in maritime employment at the time of his death is conclusive if supported by substantial evidence.

2. If so, whether there is substantial evidence to support the finding in this case.[1]

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. secs. 902 (2), (4) 903, 905, 921 (b)) are set forth in the Appendix.

---

[1] If the petition is granted the Government will also contend that, if the question whether decedent was engaged in maritime or local employment is one for the independent determination of the courts, decedent's employment was maritime and not local and that recovery may not validly be provided by state law.

STATEMENT

The decedent, a negro employee of Motor Boat Sales, Inc., respondent, was drowned when a motor boat in which he was riding overturned on a navigable river (R. 2, 21, 46). The Deputy Commissioner awarded compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 7). An action to set aside and enjoin the award under Section 21 (b) of the Act (R. 1) was dismissed by the District Court (R. 58). On appeal, the Circuit Court of Appeals for the Fourth Circuit reversed (R. 78). The facts are as follows:

The respondent was engaged in the business of selling small vessels, out-board motors for boats, and maritime supplies (R. 21, 50). The decedent was employed as a janitor and general handy man (R. 25, 28, 45). On the day of the accident, a white mechanic in respondent's employ was duly instructed to test two motors on the river for the purpose of interesting the owners of a boat in the purchase of the motors (R. 36, 40). The decedent was directed to assist the mechanic in attaching the motors to the boat (R. 40), which was pulled up on the shore of the river (R. 38, 46). On this occasion, the decedent was given no instructions to stay off the boat (R. 38, 40, 46–47), although more than eight months previously the respondent had issued general instructions, apparently applicable to all of its employees, not to get on boats in the water (R. 49). The decedent assisted in attaching one

of the motors and accompanied the mechanic on a testing trip (R. 42–43, 46). On returning, this motor was taken off, a second one was installed, and another trip was taken. On this trip, the mechanic drove the boat and the decedent acted as lookout man in the bow (R. 46–47). Since the water was muddy, the action of the decedent helped the mechanic in detecting obstructions (R. 47). The mechanic did not instruct the decedent to stay out of or to get in the boat on either trip (R. 46–47). In the course of the second trip, the boat struck an obstruction, was overturned, and the decedent was drowned. (R. 42.)

So much is undisputed. In addition, there was evidence that respondent's mechanics had previously serviced vessels on navigable waters from time to time (R. 24–25, 31–34), that the only instructions given to decedent were to "help" the mechanic (R. 40), who admittedly was authorized to test the motors on the river, that decedent was subject to the "orders" of the mechanic (R. 29), and that the latter did not in any way instruct decedent to stay out of the boat. The Deputy Commissioner found that on occasions the respondent's mechanics went aboard vessels, serviced them, and tested out ignitions on trips on navigable waters, that the decedent's services were helpful to the mechanic, that the latter, decedent's superior, tacitly approved and acquiesced in such aid, and that the decedent acted in the fur-

therance of his employer's interests and not for his own pleasure and as would be expected of a colored helper under the circumstances (R. 8). The Deputy Commissioner further found that the death arose out of and in the course of the employment, that at the time of his death the decedent was engaged in maritime employment, and that his death occurred upon navigable waters (R. 8). Accordingly, he awarded compensation to the claimants (R. 8–9).

The respondent filed suit under Section 21 (b) of the Act to set aside and enjoin the awards (R. 1). The District Court dismissed the complaint (R. 58).

On appeal, the court below reversed (R. 69). It held that the decedent's employment was a matter of "local concern" and not maritime, that recovery for the death could, therefore, validly be provided by state law (R. 72), and that under the provisions of Section 3 (a) of the Act the claim was accordingly outside the scope of the Act (R. 72, 78). In reaching this decision, the court below made an independent determination of the facts; it concluded that the mechanic's "negative acquiescence" in the decedent's presence in the boat was not a sufficient basis for holding that the decedent was engaged in maritime employment in view of the respondent's instructions not to go on navigable waters in boats (R. 77).

REASONS FOR GRANTING THE WRIT

Section 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act includes within the coverage of that Act disability or death resulting from any injury occurring upon the navigable waters of the United States if recovery therefor "through workmen's compensation proceedings may not validly be provided by State law." Such recovery for an injury occurring upon navigable water may be provided by State law only if the employment was of merely "local concern" because not of "maritime" character. *London Co.* v. *Industrial Comm'n*, 279 U. S. 109. Compare *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135, 137. In the present case the Deputy Commissioner found that at the time of his death the decedent was engaged in maritime employment (R. 8);[2] the district court sustained this finding (R. 54). The court below, however, treated

[2] That the decedent's employment at the time of his death, if authorized, was maritime and not local seems clear. The business of testing small boats and out-board motors is no less maritime than the repair of completed vessels. So much has been assumed in previous decisions of lower federal courts. *Wood Towing Corporation* v. *Parker*, 76 F. (2d) 770 (C. C. A. 4th); *Wheeler Shipyard, Inc.* v. *Lowe*, 13 F. Supp. 863 (E. D. N. Y.) affirmed, 82 F. (2d) 1022 (C. C. A. 2d); Cf. *Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th); *St. John* v. *Thomson*, 108 Vt. 66. The fact that decedent was usually employed on land in non-maritime work is immaterial if he was engaged in maritime duties at the time of his death. Cf. *Northern Coal and Dock Co.* v. *Strand*, 278 U. S. 142, 144; *Baizley Iron Works* v. *Spun*, 281 U. S. 222; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233, 236.

the question as one for its independent determination and held that the decedent's employment was local and non-maritime. In thus failing to accord finality to the decision of the Deputy Commissioner, if supported by substantial evidence,[3] the decision below is in probable conflict with *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, and *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, and presents a question of substantial importance in the administration of the Act.

1. In the *South Chicago* case the Court held that the question whether the decedent was "a member of a crew" was one of fact, on which the finding of the Deputy Commissioner, if supported by substantial evidence, was conclusive; the employer's contention that the provision of the Act excluding "a member of a crew" from its coverage was "jurisdictional," and that the question of its application was, therefore, for the courts,

[3] As appears from the Statement, *supra*, p. 3, the finding of the Deputy Commissioner is amply supported. The court below relied largely on the fact that the respondent had instructed its employees not to go on boats in the water (R. 73, 74, 77). But the Deputy Commissioner could regard that fact as of little weight in view of the facts that respondent's mechanics on a number of occasions serviced boats and motors in the water in furtherance of respondent's business (Cf. *Bull Insular Line, Inc.* v. *Schwartz*, 23 F. Supp. 359 (E. D. N. Y.)) and that the decedent acted with the tacit approval of his superior. Cf. *Maryland Casualty Co.* v. *Cardillo*, 107 F. (2d) 959 (App. D. C.); *Capital Transit Co.* v. *Hoage*, 84 F. (2d) 235 (App. D. C.); *Matter of Corrina* v. *De Barbieri*, 247 N. Y. 357.

was rejected (p. 258). The present case is not distinguishable in principle. The question whether the employee's work is maritime or local is an inquiry of fact of essentially the same character as that whether the employee is a member of a crew. Employment is held to be maritime if the "work has direct relation to navigation or commerce" (*Baizley Iron Works* v. *Span,* 281 U. S. 222, 230; *P. J. Carlin Construction Co.* v. *Heaney,* 299 U. S. 41, 44–45), a test which has acquired precise content with respect to certain familiar and frequently recurring situations (Cf. *Northern Coal and Dock Co.* v. *Strand,* 278 U. S. 142, 144; *Baizley Iron Works* v. *Span, supra*) but which, as the numerous decisions discussed in the opinion below disclose (R. 74), in borderline cases depends for its application on the particular facts. The decision in the *South Chicago* case that the Deputy Commissioner's finding, in applying a strikingly similar test of crew membership, is conclusive if supported by evidence, requires that the administrative determination as to the character of the employment be accorded a like finality.

Since Congress may constitutionally provide compensation for all injuries of employees occurring on navigable waters (*Smith & Son* v. *Taylor,* 276 U. S. 179, 181) the question whether any claim is excepted by the Act from its coverage, whether the exception be of local and non-maritime employment or of members of a crew, may

be left to the primary determination of an administrative agency. *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, 180, 184–185.

2 The holding of the court below that decedent's employment was non-maritime rests largely on its conclusion that decedent's services in the operation of the boat on the river were not authorized by respondent (R. 72–73, 74, 77, see notes 2 and 3, *supra* pp. 6, 7). In this view the issue was practically the same as whether the decedent was, at the time of the injury, acting within "the scope of his employment"; indeed the opinion below employs that very phrase (R. 72, 77). In *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, this Court held, however, that the finding of the Deputy Commissioner as to whether the accident arose out of and in the course of employment is conclusive if supported by evidence.[1] The decision below conflicts in principle with this holding; the court below avowedly reweighed the evidence on whether decedent was authorized to go in the boat (R. 76, 73).

3. The substitution of the judgment of the courts for that of the Deputy Commissioner on the issue whether a claim for compensation is within one of the statutory exceptions to the coverage of the Act tends to defeat the purpose of Congress, to provide a "prompt" and "inexpen-

[1] Section 2 (2) of the Act (*infra*, p. 12) defines "injury" as injury "arising out of and in the course of employment."

sive" (*Crowell* v. *Benson*, 285 U. S. 22, 46–47) method for the disposal of claims.[3] This Court has recognized that in order to achieve the statutory aim the determinations of the Deputy Commissioner must be given finality if supported by substantial evidence, at least where no constitutional question of jurisdiction is presented. In *Crowell* v. *Benson, supra*, this Court said (pp. 46–47):

> To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of

---

[3] That purpose is clear from the face of the act. Compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14 (b)). Where the right to compensation is controverted and an award is made by a deputy commissioner, a penalty of twenty percent is assessed for failure to make compensation within ten days after payment is due (Sec. 14 (f)). *Candado Stevedoring Corp.* v. *Lore*, 85 F. (2d) 119 (C. C. A. 2d); *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. (2d) 446 (C. C. A. 9th). If the employer fails to make payment within thirty days after compensation is due, the deputy commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15 (b)), agreements for compensation without the approval of the Commission are prohibited (Sec. 16), and the district attorney is directed to appear on behalf of the deputy commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21 (b)).

> questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded.

As the decisions discussed in the opinion below plainly reveal (R. 74), it is difficult, if not impossible, to evolve a rule of law to determine the character of an employment which is sufficiently definite and certain in its application to insure the "prompt" and "inexpensive" disposition of compensation claims by the courts. The question whether the expense and delay incident to litigation of this and similar questions may appropriately be avoided by according finality to the findings of the Deputy Commissioner is one which should be determined by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

APRIL, 1941.

APPENDIX

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C., Secs. 901 *et seq.*) are as follows:

> SEC. 2. (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> * * * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)
>
> * * * * *
>
> SEC. 3. Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *
>
> * * * * *
>
> SEC. 5. Exclusiveness of liability. The liability of an employer prescribed in section

904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district

court for the judicial district in which the injury occurred (or in the Supreme Court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 11 1941
CHARLES ELMORE CROPLEY
CLERK

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1941

L. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Specification of errors	7
Summary of argument	8
Argument	12
I. The question whether compensation might validly be provided by state law depends upon whether the decedent was engaged in maritime employment at the time of his death	12
II. The question whether decedent was engaged in maritime employment at the time of his death is one on which the findings of the deputy commissioner, being supported by substantial evidence, are conclusive	20
A. The findings of the deputy commissioner, if supported by substantial evidence, are conclusive on all issues of fact, including those on which the statutory exceptions to the coverage of the Act depends	21
B. The undisputed facts show that decedent was engaged in maritime employment, if acting within the scope of his employment and that issue is one of fact upon which the deputy commissioner's findings are conclusive, since supported by substantial evidence	24
C. Even if the question whether decedent's employment was maritime in character were a doubtful one, the determination of the deputy commissioner should be held conclusive	28
III. The claim for compensation was properly filed by decedent's widow in her own name	37
Conclusion	46
Appendix:	
A	41
B	46

419671—41——1

CITATIONS

Cases:

	Page
Alaska Packers Asso. v. Accdt. Comm., 276 U. S. 467	14
Arrow Stevedore Co. v. Pillsbury, 99 F. (2d) 446	33
Baizley Iron Works v. Span, 281 U. S. 222	13, 15, 29
Bakelite Corp'n, Ex parte, 279 U. S. 438	36
Beyerle v. Industrial Accident Comm., 75 Cal. App. 19	31
Bull Insular Line, Inc. v. Schwartz, 23 F. Supp. 359	27
Buren v. Southern Pacific Co., 50 F. (2d) 407	14
Candado Stevedoring Corp. v. Lowe, 85 F. (2d) 119	33
Capital Transit Co. v. Hoage, 84 F. (2d) 235	27
Chapman v. Griffith-Consumers Co., 107 F. (2d) 263	38
Corrina, Matter of v. De Barbieri, 247 N. Y. 357	27
Crowell v. Benson, 285 U. S. 22	11, 13, 18, 22, 23, 28, 33, 36
Danielsen v. Morse Dry Dock & Repair Co., 235 N. Y. 439	17
Dawson v. Jahncke Dry Docks, 137 So. 376	14
Grain Handling Co. v. McManigal, 23 F. Supp. 748	38
Grant Smith-Porter Co. v. Rohde, 257 U. S. 469	12, 13, 15, 33, 29
Great Lakes Co. v. Kierejewski, 261 U. S. 479	13, 25
Havard, Ex parte, 211 Ala. 605	29
Hunt v. Basil E. Kenney Lumber Co., 194 So. 366	14
Industrial Comm. v. Nordenholt Co., 259 U. S. 263	14
International Association of Machinists v. Labor Board, 311 U. S. 72	27
Johnson v. G. T. Elliott, Inc., 152 Va. 121	31
Klump v. Industrial Comm., 29 N. E. (2d) 627	31
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149	12
Labor Board v. Waterman S. S. Co., 309 U. S. 206	21
Lawson v. Maryland Casualty Co., 94 F. (2d) 193	25
Liability Assurance Co. v. Cook, 281 U. S. 233	13, 14, 15, 20, 29
Liberty Stevedoring Company v. Cardillo, 18 F. Supp. 729	38
London Co. v. Industrial Comm'n, 279 U. S. 109	14, 15, 16, 23, 25, 28
Lykes Bros.-Ripley Steamship Co., Inc. v. Sheppeard (D. C. E. D. Tex.), decided November 13, 1935	32
Maryland Casualty Co. v. Cardillo, 107 F. (2d) 959	27, 38
McCandless v. Furlaud, 293 U. S. 67	38
McCormack Lumber Co., Charles M. v. Marshall (W. D. Wash., July 6, 1937)	32
McLaughlin v. United States, 107 U. S. 526	39
Metropolitan Casualty Ins. Co. v. Hoage, 89 F. (2d) 798	38
Millers' Underwriters v. Braud, 270 U. S. 59	14
Moss Tie Co., T. J. v. Tanner, 44 F. (2d) 928	29
New Amsterdam Casualty Co. v. McManigal, 87 F. (2d) 332	16
New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96	25
Nogueira v. N. Y., N. H. & H. R. Co., 281 U. S. 128	12
Northern Coal Co. v. Strand, 278 U. S. 142	13, 14, 35
Norton v. Gulf Refining Co., 94 F. (2d) 380	30
O'Reilly v. Campbell, 116 U. S. 418	39

Cases—Continued. Page

Pacific Telephone & Telegraph Co. v. *White*, 104 F. (2d) 923. 28
Panell, The, 266 U. S. 433 14
Passavant v. *United States*, 148 U. S. 214 36
Reetz v. *Michigan*, 188 U. S. 505 36
Robins Dry Dock Co. v. *Dahl*, 266 U. S. 449 13
Rochester Tel. Corp. v. *United States*, 307 U. S. 125 35, 36
Rosengrant, Ex parte, 213 Ala. 202 29
Rosengrant v. *Havard*, 273 U. S. 664 14, 29, 30
St. John v. *Thomson*, 108 Vt. 66 14, 25, 31
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 36
Shields v. *Utah Idaho R. Co.*, 305 U. S. 177 10, 23, 32, 34, 35
Singer Manufacturing Co. v. *Rahn*, 132 U. S. 518 27
Smith & Son v. *Taylor*, 276 U. S. 179 14, 23, 29
South Chicago Co. v. *Bassett*, 309 U. S. 251 9, 22, 23, 31, 35
Southern Pacific Co. v. *Jensen*, 244 U. S. 205 12, 13, 18, 20
Southern Shipping Co. v. *Lawson*, 5 F. Supp. 321 38
Spencer Kellogg Co. v. *Hicks*, 285 U. S. 502 15
State v. *Missouri Workmen's Compensation Com.*, 181 S. W. (2d) 986 30
State Industrial Board v. *Terry & Tench Company, Inc.*, 273 U. S. 639 14
Sultan Ry. Co. v. *Dept. of Labor*, 277 U. S. 135 14, 16, 31
Sunny Point Packing Co. v. *Faigh*, 63 F. (2d) 921 16, 30
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381 34
Teahan v. *Industrial Accidents Com.*, 210 Cal. 342 30
Travellers' Insurance Co. v. *Bacon*, 30 Ga. App. 728 30
The Troy, 208 U. S. 321 14
United States v. *Ju Toy*, 198 U. S. 253 36
Voehl v. *Indemnity Ins. Co.*, 288 U. S. 162 9, 10, 22, 24, 26
Washington v. *Dawson & Co.*, 264 U. S. 219 12, 15
Western Union Telegraph Co. v. *Hill*, 67 F. (2d) 487 27
Wheeler Shipyard v. *Lowe*, 13 F. Supp. 863, affirmed without opinion, 82 F. (2d) 1022 25
Wood Towing Corp. v. *Parker*, 76 F. (2d) 770 25

Statute:

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (33 U. S. C., Secs. 901 *et seq.*):

Sec. 2 (2) 25, 41
(4) 15, 18, 19, 41
Sec. 3 (a) 7, 8, 12, 19, 23, 41
Sec. 5 37, 39, 41
12 (a) 42
(b) 42
Sec. 13 43
Sec. 14 (b) 33
(f) 33
Sec. 15 (b) 33
Sec. 16 33

Statute—Continued. Page
Sec. 18 3
Sec. 19 (a) 21, 39, 41
(b) 34
Sec. 21 (b) 9, 21, 44
32 (a) 15, 18
Virginia Workmen's Compensation Act, as amended, 1940 Supp. to Va. Code of 1936, Title 16, Chap. 76A, §1887 (15) 6

Miscellaneous:
20 CFR 31.5, Form US-262 40
H. R. 9498, 69th Cong., 1st Sess. 19
H. R. No. 1767, 69th Cong., 2d Sess. 19
Robinson, Admiralty (1939), p. 103. 14
S. R. 973, 69th Cong., 1st Sess. 19
S. 3170, 69th Cong., 1st Sess. 19

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 46

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the Eastern District of Virginia (R. 54–56) is not reported. The opinion of the Circuit Court of Appeals (R. 69–78) is reported in 116 F. (2d) 789.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 6, 1941 (R. 78–79). The

petition for writ of certiorari was filed on April 3, 1941, and was granted on May 12, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in an action under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act to enjoin and set aside an award of compensation, a finding of the Deputy Commissioner that the decedent was engaged in maritime employment at the time of his death is conclusive if supported by substantial evidence.

2. If so, whether there is substantial evidence to support the finding in this case.

3. A question raised by respondent despite its failure to have raised it before the Deputy Commissioner or District Court is whether the proceeding is void because the claim for compensation was filed by decedent's widow in her own name and not as "legal representative."

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (33 U. S. C. secs. 902 (2), (4), 903, 905, 912 (a), (b), 913, 919 (a), (b), 921 (b)) are set forth in the Appendix.

STATEMENT

The decedent, a negro employee of Motor Boat Sales, Incorporated, respondent, was drowned when a motorboat in which he was riding overturned on a navigable river (R. 2, 21, 42, 46). After hearing upon a claim filed by decedent's widow, the Deputy Commissioner awarded compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 7–9). An action by respondent to set aside and enjoin the award under Section 21 (b) of the Act (R. 1) was dismissed by the District Court (R. 58–59). On appeal, the Circuit Court of Appeals for the Fourth Circuit reversed (R. 78–79).

The facts are as follows:

The respondent was engaged in the city of Richmond, Virginia, in the business of selling maritime supplies, outboard motors, and small boats (R. 21, 50). The decedent, George Armistead, was employed by respondent as a janitor, porter, and general handy man (R. 25, 28, 35, 45, 49).

On August 8, 1938, the date decedent was drowned, the mechanic and the store manager-treasurer employed by respondent, decided to have two of respondent's outboard motors taken to the James River in order to test them on a privately owned boat which had been shown to them earlier in the day (R. 36, 37, 40). The purpose of testing the motors, apparently, was to interest the owner of the boat in buying one of them (R. 39–40, 44).

The mechanic's helper, who was a white man named Cooper, and decedent were sent to the river with the motors (R. 28, 36, 40, 42, 45). According to witnesses called by respondent, decedent had instructions to assist Cooper in unloading the motors from respondent's trailer, attaching them to the boat, and putting them back in the trailer after the tests (R. 36, 40, 45). Decedent was not told to stay off the boat (R. 38, 40, 46–47), although more than eight months previously respondent had issued general instructions, apparently applicable to all its employees, not to get on boats in the water (R. 49–50).

Upon arriving at the river, decedent assisted in attaching one of the motors to the boat, which was on the bank, and, after helping to put the boat in the water, accompanied Cooper and the owner of the boat and his brother on a testing trip (R. 42–44, 46). Following this trip, the motor was taken off and the other one was attached, decedent assisting from inside the boat, which, except for the stern, remained in the water (R. 43–44, 46–47). Cooper and decedent then took a second trip, without the other two men, "To try the motor out and see how it operated" (R. 43, 46–47). Cooper drove and decedent sat in the front seat and kept a lookout, which was helpful to Cooper, since the water was muddy (R. 47). In the course of the trip, the boat struck something and overturned and decedent was drowned (R. 2, 27, 42, 46). Cooper had

not instructed decedent either to stay out of or to get in the boat on either trip (R. 42, 46–47).

So much is undisputed. In addition, there was evidence that on at least one occasion respondent had taken a prospective customer for a boat ride on navigable water for the purpose of interesting him in buying a cruiser (R. 24). There was also testimony that from time to time respondent would send its mechanic to repair ignitions or otherwise service customers' boats on navigable water if they "needed anything," the mechanic sometimes accompanying the customer on test trips in order to "adjust the carburetor or anything like that" (R. 24–25, 31–34). The mechanic testified that on the date in question he either told Cooper "to take George (decedent) or I told George to go and help" (R. 40). Finally, there was evidence that customarily when decedent was sent out from the store he was subject to "orders" and, supposedly, would be subject to the orders of respondent's white employees (R. 29).

The Deputy Commissioner found, *inter alia*, that Cooper was decedent's superior and that decedent was to assist him; that decedent's services in acting as a lookout were helpful to Cooper and were tacitly approved and acquiesced in by him; that they were in furtherance of respondent's interests and not for pleasure; that decedent acted as would be expected of a colored helper under the circumstances; and that on occasions respondents me-

chanics went aboard vessels, serviced them, and tested ignitions on trips on navigable waters (R. 8). The Deputy Commissioner further found that the death arose out of and in the course of the employment, that it occurred upon navigable waters, and that decedent was engaged in "maritime employment" at the time of his death (R. 8). Accordingly, the Deputy Commissioner made an award of compensation (R. 8–9).

Thereafter, pursuant to Section 21 (b) of the Act, respondent filed suit in the United States District Court for the Eastern District of Virginia to enjoin and set aside the award (R. 1). The District Court dismissed the complaint (R. 58). It held, in substance, that the finding of the Deputy Commissioner that the death arose out of and in the course of decedent's employment was conclusive, since supported by evidence, that the other findings, including, apparently, the finding that decedent's employment was maritime, were supported by evidence, and that the Virginia Workmen's Compensation Act is not and could not be made applicable (R. 55–56).[1]

On appeal the court below reversed the decree of the District Court and remanded the cause with

[1] The Virginia Workmen's Compensation Act, as amended in 1938, excepts from its coverage employers with less than eleven employees regularly in service. 1940 Supp. to Va. Code of 1936, Title 16, Chap. 76A, § 1887 (15). There was testimony that respondent had only six employees on the day decedent was drowned (R. 21.)

instructions to enter judgment for respondent (R. 78–79). It held that decedent's employment at the time of death was "local," not maritime (R. 72, 79). It therefore ruled that although the Virginia compensation statute was inapplicable to respondent because respondent employed less than the minimum number of persons specified in that Act, compensation could validly be provided by state law (R. 73, 78). The court accordingly held that the award was invalid because of the provision of Section 3 (a) of the Act specifying that compensation is payable under the Act only "if recovery * * * through workmen's compensation proceedings may not validly be provided by state law" (R. 72, 78). In reaching this decision, the court concluded that in view of respondent's general instruction not to go aboard boats on navigable waters, Cooper's "negative acquiescence" in the decedent's presence in the boat was not a sufficient basis for holding that the decedent was engaged in maritime employment (R. 77).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In undertaking to determine, independently of the Deputy Commissioner's findings, whether at the time of his death decedent was engaged in maritime employment.

2. In failing to hold that the findings of the Deputy Commissioner that decedent was engaged, at

the time of his death, in maritime employmer were supported by substantial evidence and, ther fore, conclusive.

3. In holding that decedent's employment at t time of his death was rather local than maritim and that a state compensation law could valid provide recovery for his death.

4. In failing to hold that the finding of t Deputy Commissioner that decedent's death aro out of and in the course of his employment w supported by substantial evidence and, therefo conclusive.

5. In holding that decedent's death did not ari out of and in the course of his employment.

SUMMARY OF ARGUMENT

I

Section 3 (a) of the Longshoremen's Act pr vides that compensation may not be secured und the Act if recovery through workmen's compens tion proceedings may validly be provided by sta law. Under the decisions of this Court that que tion depends on the nature of the employment the time of the injury. If the employment nonmaritime, the matter is one of "local concern and subject to state regulation. If, however, t locale of the injury and the employment are bo maritime, the application of a state act is preclude This is so despite that the employee's usual duti are on land and that the vessel on which he is i

jured is used solely in local intrastate operations in connection with a local business on land.

II

The court below treated the question whether decedent was engaged in maritime employment as one for its own independent determination, whereas it should have held that the findings of the Deputy Commissioner, supported by substantial evidence, were conclusive.

A. Under Section 21 (b) of the Act, providing for judicial review of compensation awards "if not in accordance with law," the deputy commissioner's findings of fact are conclusive if supported by substantial evidence, including his findings determining issues of statutory coverage. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166; *South Chicago Co.* v. *Bassett*, 309 U. S. 251.

The validity of this limitation of judicial review in cases involving the provision in controversy cannot be doubted. The admiralty jurisdiction conferred by Article III, from which the power of Congress to legislate on maritime subjects is implied, extends to all injuries on navigable waters. As the Congress was thus at liberty to include or exclude cases to which state acts might be applied, it may commit to an administrative agency the authority to determine the question whether the statutory exception is applicable.

Shields v. *Utah Idaho R. Co.*, 305 U. S. 177, 180, 184–185.

B. In the *Vochl* case, *supra*, the Court held that the findings of the deputy commissioner on the question whether the injury there involved arose out of and in the course of the employment were conclusive since supported by substantial evidence. The crucial question determined by the Deputy Commissioner in the instant case is, in substance, the nearly identical one of fact whether decedent was acting within the scope of his employment when drowned. In the undisputed circumstances, there can be no question that the boat in which decedent was riding was within the maritime jurisdiction and that the work in which the decedent was engaged at the time was also maritime. This is equally true whether the work be viewed as in aid of the navigation of the vessel or as relating to the installation of a motor. Whether decedent's employment was maritime depends, therefore, on whether his work was within the scope of his employment. The findings of the Deputy Commissioner on this issue are supported by substantial evidence and are conclusive.

C. If we are wrong in our contention that the undisputed circumstances permit of no doubt that the work in which decedent was engaged was maritime in character, the finding of the Deputy Commissioner that decedent was engaged in maritime employment, nevertheless should be treated as con-

clusive, since not arbitrary or unsupported by substantial evidence.

1. The consequence of allowing an independent review on the question of the character of the employment in cases under the Act would be, in numerous instances, to encourage protracted litigation and thus prevent the expeditious disposal of claims. For while often the answer to the question is clear from decisions of this Court in cases involving similar facts, there are many borderline cases which are without close precedent. The confusion in the decisions reflects the impossibility of evolving a rule of law by which to determine with reasonable certainty whether the employment in such cases is maritime or local.

2. Sections 19 and 21 (b), construed in the light of the purpose of Congress to provide a "prompt" and "inexpensive" (*Crowell* v. *Benson*, 285 U. S. 22, 46) method for the disposition of claims, and in the light of the scope of review of determinations of other administrative agencies, require that the deputy commissioner's determination as to the character of the employment be treated as one of fact and be held conclusive when supported by substantial evidence.

III

The contention that the proceeding is void because the claim for compensation was filed by decedent's widow in her own name and not as

"legal representative" is not properly before the Court, since not raised before the Deputy Commissioner, and is, in any event, without merit.

ARGUMENT

I

THE QUESTION WHETHER COMPENSATION MIGHT VALIDLY BE PROVIDED BY STATE LAW DEPENDS UPON WHETHER THE DECEDENT WAS ENGAGED IN MARITIME EMPLOYMENT AT THE TIME OF HIS DEATH

The Longshoremen's and Harbor Workers' Compensation Act was enacted (1927) as a consequence of the decisions of this Court (*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219) that the grant of admiralty jurisdiction in Article III of the Constitution contemplated uniformity and precluded the application of state workmen's compensation laws to injuries suffered by persons engaged in maritime employment on vessels in navigable waters. See *Noguera* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 131, 135–136. By Section 3 (a) Congress limited the coverage of the Act to instances in which "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." In so doing Congress evidently intended to leave to the states such cases as might fall within the "local concern" rule, which this Court had adopted (*Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469, and cases *infra*, pp. 13–14)

as an exception to or limitation upon the requirement of uniformity announced in the *Jensen* case, *supra*. See *Crowell* v. *Benson*, 285 U. S. 22, 39–40; and footnote 6, *infra*, pp. 18–19.

Whether an injury occurring on navigable waters is a matter of "local concern" so as to be subject to state power depends on whether the employment at the time of the injury has a "direct" relation to navigation or commerce, as had been held by this Court prior to the passage of the Act. Where the employment at the time of the injury, as well as the locale of the injury, is maritime the relation is deemed direct. *Great Lakes Co.* v. *Kierejewski*, 261 U. S. 479, 480–481 (boiler maker engaged in repair work on completed scow moored in navigable waters); *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449, 457 (workman engaged in repairing completed steamer moored in navigable waters); *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 144 (stevedore unloading vessel tied to dock); *Baizley Iron Works* v. *Spun*, 281 U. S. 222, 230, 232 (employee of iron works engaged in painting completed vessel tied to dock); *Liability Assurance Co.* v. *Cook*, 281 U. S. 233, 236 (employee of Ford Motor Company unloading ship). The relation has been held indirect or incidental, however, where, although the locale may have been maritime, the employment was nonmaritime. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476 (carpenter constructing uncompleted vessel launched on navigable

waters); *Millers' Underwriters* v. *Braud*, 270 U. S. 59, 64–65 (diver employed by shipbuilding company engaged in removing timbers of abandoned ways which had become an obstruction to navigation)[2]; *Alaska Packers Asso.* v. *Accdt. Comm.*, 276 U. S. 467, 469 (employee standing on shore endeavoring to push fishing boat into water to float it to nearby dock for winter storage); *Sultan Ry. Co.* v. *Dept. of Labor*, 277 U. S. 135, 137 (employees assembling logs for towage or breaking up booms after towage).[3] See *London Co.* v. *Industrial Comm'n*, 279 U. S. 109, 121; *Robinson*, Admiralty (1939), p. 103.

If the employment at the time of injury is maritime, it is immaterial that such maritime work was temporary or that the man's usual employment was on land (*Northern Coal Co.* v. *Strand*, *supra*, 144; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233, 236; *Buren* v. *Southern Pacific Co.*, 50 F. (2d) 407 (C. C. A. 9th); *St. John* v. *Thomson*, 108 Vt. 66; *Dawson* v. *Jahncke Dry Docks*, 137 So. 376 (Ct. of App., La.); *Hunt* v. *Basil E. Kenney Lumber Co.*, 194 So. 366 (Fla.); and cases *infra*, p. 25); that the employer was not the owner of the vessel in-

[2] Dikes, wharves, piers, and like objects attached to the shore are regarded as extensions of the land. *The Troy*, 208 U. S. 321; *The Panoil*, 266 U. S. 433; *Industrial Comm.* v. *Nordenholt Co.*, 259 U. S. 263, 275; *Smith & Son* v. *Taylor*, 276 U. S. 179, 182.

[3] The local concern rule was applied without opinion in *State Industrial Board* v. *Terry & Tench Company, Inc.*, 273 U. S. 639; *Rosengrant* v. *Havard*, 273 U. S. 664.

volved but of a local business conducted on land (*Washington* v. *Dawson & Co.*, 264 U. S. 219, 228; *Baizley Iron Works* v. *Span*, 281 U. S. 222); that the vessel was engaged solely in local intrastate commerce (*London Co.* v. *Industrial Comm'n*, 279 U. S. 109, 124); that it was not engaged in general commerce, but was used only locally in connection with a business on land (*Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 506, 514); or that the state compensation act is elective and the employer has voluntarily insured under it. *Liability Assurance Co.* v. *Cook*, 281 U. S. 233; *Baizley Iron Works* v. *Span*, 281 U. S. 222. Cf. *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469.[4]

Several of the lower federal courts have indicated that a case might fall within the "local con-

[4] The suggestion in the opinion below (R. 78) that the employer could not have been expected to insure against the risk of decedent's drowning is without substance. As set forth in the Statement (p. 3), the defendant was engaged in the business of selling boats, motors, and maritime supplies. As a normal incident of such a business, the defendant's mechanics went on the water to test or repair motors (R. 24-25, 31-34). The respondent should obviously have anticipated the risk of injury to his employees while engaged in such duties and could have insured against injury to any of its employees without difficulty. Indeed, under the provisions of Section 2 (4) and 32 (a), respondent had the duty of insuring under the Act, as have all employers one or more of whose employees are engaged "in maritime employment, in whole or in part, upon the navigable waters of the United States." We are informed through the United States Employees' Compensation Commission that laundries, grocery, telegraph companies, and other concerns which conduct their business principally on land but which perform

cern" exception notwithstanding that the employment was maritime. *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. (2d) 332, 334 (C. C. A. 2d); *Sunny Point Packing Co.* v. *Faigh*, 63 F. (2d) 921, 923 (C. C. A. 9th). But the controlling decisions of this Court already cited are to the contrary. In each of the cases in which the Court held that the "local concern" doctrine was applicable, including *Sultan Ry. Co.* v. *Dept. of Labor*, *supra*, which contains a *dictum* relied on by the above-mentioned lower courts, the employment was nonmaritime.[5] See *London Co.* v. *Industrial Comm'n.*, 279 U. S. 109, 121.

While the test of what constitutes maritime employment is admittedly difficult in borderline in-

---

occasional services on board vessels, take out insurance under the Act for all employees, the premium being determined by a pay-roll audit showing the percentage of time spent by the employee in performing maritime services.

[5] In the *Sultan Ry.* case the Court said (277 U. S. at 137), "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

However, the Court did not state that the particular employment there involved was maritime, and in the *London Co.* case, *supra*, later decided, it expressly said that the employment in the *Sultan Ry.* case clearly "had only an incidental relation to navigation" and "was not maritime" (279 U. S. at 121).

stances without close precedent, even greater difficulties would be encountered if, as the lower federal court decisions cited suggest, the coverage of the Act were made to turn on the vague question whether, in the particular case, the application of a state statute would work a material prejudice to the characteristic features of the maritime law or interfere with its uniformity. In *Danielsen* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 439, where the employment was maritime and the state law, therefore, inapplicable, the court said (per Judge Cardozo, at 443):

> The service here was maritime. * * * the decision in *Grant-Smith-Porter Co.* v. *Rohde* * * * does not mean that the court in every case is to weigh the comparative merits of uniformity and diversity, and decide for or against the statute as the balance may incline to one side or the other. That would be to introduce an element of uncertainty, productive of litigation and hardship almost without limit. Neither workman nor employer would know his rights and remedies until the final word had been spoken by the last appellate court. Too often the Statute of Limitations would then bar the substitution of the right choice for the wrong one.

For these reasons, we submit that if in the instant case the decedent was engaged in maritime employment at the time he was drowned, as was found by the Deputy Commissioner (R. 8), com-

pensation could not validly be provided by state law and the Longshoremen's Act applies. In taking this position, however, we do not mean that, as an original matter, we would agree with the doctrine of the *Jensen* case. We mean only that, accepting the doctrine as established, as did Congress, the maritime employment test is controlling with respect to the proper application of the "local concern" exception to the Act.

That Congress may well have had the maritime employment test in mind when it adopted the Act is indicated, first, by the fact noted in *Crowell* v. *Benson*, 285 U. S. 22, at 39, that it "evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature"; and secondly, by the fact that in Section 2 (4) it defined an "employer", who is required to insure under the Act (Sec. 32 (a)), as one "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * *."[6]

---

[6] The legislative history shows that the framers of the Act and Congress had the decisions of this Court in mind, but, apart from that, it affords little light on the question whether Congress intended the maritime employment test to govern. The bill, as first introduced defined an "employer" as one engaged "in any employment covered by this Act," and provided that the Act should apply to "any employment performed on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation and com-

Congress seems, therefore, to have accepted the decisions of this Court marking out the boundary line between the employments which state compensation acts could cover, and those which only a federal act could cover. The provision in Section 2 (4), restricting the coverage of the federal act to those whose employees are "in maritime employment, in whole or in part, upon the navigable waters of the United States" and the provisions of Section 3, limiting compensation to cases where "recovery * * * may not validly be provided by state law" were apparently designed as co-

---

merce; * * *." S. 3170, H. R. 9198, Art. I, Sec. 3, 69th Cong., 1st Sess. In the hearings before the subcommittee of the Senate Judiciary Committee (p. 95) and before the House Judiciary Committee (p. 65) private opponents of the bill objected to this latter provision as being vague and productive of litigation. The Senate Judiciary Committee reported an amended bill defining an "employer" as one "any of whose employees are employed in whole or in part upon the navigable waters of the United States * * *" and containing a coverage provision similar to that finally adopted. S. R. No. 973, 69th Cong., 1st Sess. In the hearings before the House Judiciary Committee on this amended bill, certain private witnesses objected that the definition of "employer" was so broad as to include employers of persons, such as Western Union messenger boys, casually on navigable waters (pp. 179-180, 196-197). A representative of the American Steamship Owners' Association suggested that the words "except employment of local concern and of no direct relation to navigation and commerce" should be added to the definition (p. 180). However, the Committee reported the bill with an amendment adding the phrase "in maritime employment," which appears in the bill as finally enacted. H. R. No. 1767, 69th Cong., 2d Sess.

extensive categories. If this be so, the decisions of this Court in the *Jensen* and subsequent cases might well be regarded as having been received into the Act, crystallized into the definition found in section 2 (4). In this view, whatever the soundness of the *Jensen* case and its successors, a judicial departure from the doctrine announced in them would apparently be in conflict with the terms of the Act, whether or not in other instances affecting maritime affairs the doctrine of the *Jensen* case were to be overruled, or the "local concern" exception extended. Compare *Liability Assurance Co. v. Cook*, 281 U. S. 233, 237 (concurring opinion of Mr. Justice Stone).

II

THE QUESTION WHETHER DECEDENT WAS ENGAGED IN MARITIME EMPLOYMENT AT THE TIME OF HIS DEATH IS ONE ON WHICH THE FINDINGS OF THE DEPUTY COMMISSIONER, BEING SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE CONCLUSIVE

The Deputy Commissioner found that decedent's presence and assistance on the boat on the fatal trip was tacitly approved by decedent's immediate superior, that decedent was performing service for respondent, that the death arose out of and in the course of decedent's employment, and that the employment at the time of death was maritime (R. 7, 8). The District Court held, in substance, that these findings were supported by the evidence and were therefore conclusive (R. 55, 59). The court below, however, as already indicated (*supra*, p.

7), made independent findings, which were contrary to those of the Deputy Commissioner.[7] It did so, apparently, without holding that the latter were unsupported by substantial evidence.

In thus failing to accord finality to the findings of the Deputy Commissioner if supported by substantial evidence, as we shew hereinafter that they are (*infra*, pp. 26–27), the decision of the court below contravenes the provisions and policy of the Act, decisions of this Court under the Act, and well-settled principles with respect to the proper scope of judicial review of administrative determinations in general. It was for this reason that certiorari was sought (Pet. 6–11). Cf. *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206.

A. THE FINDINGS OF THE DEPUTY COMMISSIONER, IF SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE CONCLUSIVE ON ALL ISSUES OF FACT, INCLUDING THOSE ON WHICH THE STATUTORY EXCEPTIONS TO THE COVERAGE OF THE ACT DEPEND

Section 19 of the Act, in providing for the filing of a "claim for compensation," specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Section 21 (b) provides

[7] After having put the question "Was Armistead engaged in maritime employment at the time of his death so that a recovery may be had under the Act?", the court found, *inter alia*, that "Armistead's employment at the time of his death was strictly local" (R. 72) and pertained to matters "having only an incidental relation to navigation and commerce" (R. 73).

that a compensation order may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law". By this section the review of the courts is limited to questions of law which, of course, include the question whether the deputy commissioner's findings of fact are supported by substantial evidence. Cf. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, 169. If they are so supported, they are conclusive notwithstanding that they relate to the "coverage" of the Act, as was held in *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 258, which involved the question whether the decedent there was a "member of a crew" excepted from the coverage of the Act by paragraph (a) (1) of Section 3. See also cases *infra*, pp. 34–35.

There is clearly no constitutional objection to according finality to the deputy commissioner's adequately supported findings of fact on issues of coverage, such as that here presented, not involving what in *Crowell* v. *Benson*, 285 U. S. 22, 54–55 were termed constitutional "jurisdictional" facts.*

---

* In *Crowell* v. *Benson*, *supra*, hitherto relied on by respondent, the Court, to avoid constitutional doubts, construed the Act to permit an independent judicial determination of so-called constitutional "jurisdictional" facts. But such facts were limited to the questions whether the injury occurs upon the navigable waters of the United States and whether the relationship of employer and employee exists at the time of

The provision of Section 3 (a) excepting claims from the coverage of the Act where recovery may be provided by state law is wholly statutory and is not required by the Constitution. The grant of judicial power in cases of "admiralty and maritime jurisdiction" (Art. III), from which the power of Congress to legislate on maritime subjects is implied, extends to all injuries occurring on navigable waters. *Grant Smith-Porter* v. *Rohde*, 257 U. S. 469, 477; *Smith & Son* v. *Taylor*, 276 U. S. 179, 181; *London Co.* v. *Industrial Comm'n*, 279 U. S. 109, 120. The question whether any claim is within the exception of Section 3 (a) may therefore be committed to the primary determination of an administrative agency. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 180, 184–185; *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 258.

In the *Shields* case, this Court had before it a determination of the Interstate Commerce Commission that a carrier was not an interurban electric railway within the provisions of the Railway

---

the injury, the answers to which were considered as determinative of the constitutional power of Congress. Since neither of those questions is disputed in the instant case and since the concept of "jurisdictional" facts has not been extended, it cannot be said that *Crowell* v. *Benson* is opposed to our contention here. On the contrary, the opinion of the Court affords affirmative support for our contention. 285 U. S. at 46–47.

Labor Act excluding such railways from the scope of that Act. The Court said (305 U. S. at 180):

> As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. * * *

And later the Court said (305 U. S. at 184–185):

> As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial *de novo* so far as the character of the respondent is concerned. * * *

B. THE UNDISPUTED FACTS SHOW THAT DECEDENT WAS ENGAGED IN MARITIME EMPLOYMENT, IF ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT, AND THAT ISSUE IS ONE OF FACT UPON WHICH THE DEPUTY COMMISSIONER'S FINDINGS ARE CONCLUSIVE, SINCE SUPPORTED BY SUBSTANTIAL EVIDENCE

In *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, the Court held that the deputy commissioner's findings, supported by substantial evidence, were conclusive on the issue whether the injury there involved arose out of and in the course of the

employment.[2] The issue here is, in substance, the nearly identical one whether decedent was acting within the scope of his employment. For in the undisputed circumstances (*supra*, pp. 3–5), there can be no doubt that the boat in which decedent was riding was on navigable water within the maritime jurisdiction, and that his work at the time, whether regarded as being his particular activity as lookout or his general activity in assisting in the attachment and testing of the motors, was maritime in character. Cf. *London Co.* v. *Industrial Comm'n.*, 279 U. S. 109; *Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th); *Wheeler Shipyard* v. *Lowe*, 13 F. Supp. 863 (E. D., N. Y.), affirmed without opinion, 82 F. (2d) 1022 (C. C. A. 2d); *Wood Towing Corp.* v. *Parker*, 76 F. (2d) 770 (C. C. A. 4th); *St. John* v. *Thomson*, 108 Vt. 66. The testing of a motor on a completed vessel upon navigable waters clearly has as direct a relation to navigation and hence is as "maritime" as the repair (*Great Lakes Co.* v. *Kierejewski*, 261 U. S. 479), or reconditioning (*New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96) of such a vessel.

Accordingly, as the work in which decedent was engaged at the time of death was maritime, his employment was maritime if the work was within

[2] Section 2 (2) of the Act defines an "injury" covered by the Act as one "arising out of and in the course of employment."

the scope of his employment. This question would seem to be no less one of fact than was the question in the *Vochl* case. The issue there was said to turn "on the general nature and scope of the employee's duties, the particular instructions he had received, and the practice which obtained as to work in extra hours or on Sunday, and the purpose of the journey in which he was injured." 288 U. S. at 166. Here the issue correspondingly turns on the facts with respect to decedent's general duties as handyman, the particular instructions he had received, the purpose of his accompanying Cooper on the trip on the river, the service performed by him in acting as look-out, the relationship between him and Cooper, and Cooper's acquiescence in or approval of his presence in the boat.

That the record contains ample evidence to support the deputy commissioner's findings on these matters sufficiently appears from the references in the Statement (*supra*, pp. 3–5). The evidence there summarized permitted the Deputy Commissioner to conclude that the decedent's instructions on the day in question authorized him to assist, or contemplated that he would assist, Cooper in such manner as Cooper might direct; that Cooper was authorized to go upon the water to test the motor; that he approved the assistance given by the decedent; and that the respondent's prior instruction not to go on the water was general and had been

often disregarded with the respondent's tacit approval. Cf. *Bull Insular Line, Inc.*, v. *Schwartz*, 23 F. Supp. 359 (E. D. N. Y.).

The court below, determining the facts independently, apparently concluded that decedent was not acting within the scope of his employment for the reason that he departed from the general instruction (R. 73, 77). But since there was evidence from which the Deputy Commissioner could have inferred that decedent's presence and assistance in the boat was authorized by Cooper acting for respondent or, at least, that decedent reasonably believed that he was acting within the scope of his duties and in furtherance of respondent's business, the existence of the general instruction may not be accorded decisive weight. The issue as to whether decedent was acting in the scope of his employment so as to be protected by the Act should not be made to turn on the technical learning which has grown about the doctrine of *respondeat superior*. Cf. *International Association of Machinists* v. *Labor Board*, 311 U. S. 72, 80. Even if those rules were controlling, however, the Deputy Commissioner was justified in not treating the violation of the general instructions as determinative. Cf. *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518, 522–523; *Maryland Casualty Co.* v. *Cardillo*, 107 F. (2d) 959 (App. D. C.); *Capital Transit Co.* v. *Hoage*, 84 F. (2d) 235 (App. D. C.); *Matter of Corrina* v. *De Barbieri*, 247 N. Y. 357; *Western*

Union Telegraph Co. v. *Hill*, 67 F. (2d) 487, 488 (C. C. A. 5th); *Pacific Telephone & Telegraph Co.* v. *White*, 104 F. (2d) 923, 926 (C. C. A. 9th).

C. EVEN IF THE QUESTION WHETHER DECEDENT'S EMPLOYMENT WAS MARITIME IN CHARACTER WERE A DOUBTFUL ONE, THE DETERMINATION OF THE DEPUTY COMMISSIONER SHOULD BE HELD CONCLUSIVE

If we are in error in our contention that under the undisputed facts decedent's work at the time of his death was not so clearly maritime in character as to present no question on that score, the findings of the Deputy Commissioner, based on substantial evidence, nevertheless should have been accorded finality by the court below.

We shall show (1) that the consequence of permitting an independent determination by the courts on questions as to the character of the employment would be to encourage protracted litigation and prevent a "prompt" and "inexpensive" method for the disposition of claims (cf. *Crowell* v. *Benson*, 285 U. S. 22, at 46); and (2) that Sections 19 and 21 (b), construed in the light of the purposes of the Act, exclude such a review.

1. In a large number of cases the question whether the employment was maritime is controlled by decisions of this Court and no difficulty is presented. Thus, it is established that the navigation, loading or unloading, supplying or repair of a completed vessel, which are all traditionally maritime in character, are not matters of local concern. *London Co.* v. *Industrial Comm'n*, 279

U. S. 109; *Baizley Iron Works* v. *Spun*, 281 U. S. 222; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233. Likewise, it is established that employment in the construction of an uncompleted vessel is nonmaritime (*Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469) and that employment on docks or other recognized extensions of the land is similarly subject to state regulation. *Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179; and other cases cited *supra*, p. 14, footnote 2.

In many borderline cases, however, such as those cited in the paragraphs next succeeding, there is no close precedent to determine the question whether the local concern doctrine is applicable and a difficult appraisal of the particular facts is necessary. No rule of law sufficiently definite can be evolved which will permit the prompt and inexpensive disposition of compensation claims in such cases if the question of the character of the employment must be determined independently by the courts.

In *Ex parte Rosengrant*, 213 Ala. 202, and *Ex parte Havard*, 211 Ala. 605, both affirmed without opinion in *Rosengrant* v. *Havard*, 273 U. S. 664, where a lumber inspector was injured while on board a schooner for the purpose of checking a cargo as it was discharged from a nearby barge, the employment was held to be of local concern. In *T. J. Moss Tie Co.* v. *Tanner*, 44 F. (2d) 928 (C. C. A. 5th), however, employment on a barge checking ties which were to be transferred to a boat

for shipment was held to be maritime and not local, because the work had to be done from the boat. The *Rosengrant* case was distinguished on the ground that in that case the employee could have checked the discharged cargo from the dock. See also *Norton* v. *Gulf Refining Co.*, 94 F. (2d) 380 (C. C. A. 3d); cf. *Teahan* v. *Industrial Accident Com.*, 210 Cal. 342.

In *Sunny Point Packing Co.* v. *Faigh*, 63 F. (2d) 921 (C. C. A. 9th), the work of a watchman on a floating fishtrap, which was anchored to the shore, was held to be of local concern. But the same court held that a watchman on a boat being repaired came within the exclusive maritime jurisdiction, distinguishing the *Sunny Point* case on the ground that the fishtrap involved in that case had been anchored and fastened by a long cable to the shore. The attachment of the vessel to the shore was not deemed significant, however, in *State* v. *Missouri Workmen's Compensation Com.*, 181 S. W. (2d) 986 (St. Louis Ct. of Appeal, Mo.), where the work of a mat weaver, employed to weave mats on a barge attached to the shore and to rest the mats on the river bed to control the flow of the river channel for navigation, was held to be maritime, and not local.

In *Travellers' Insurance Co.* v. *Bacon*, 30 Ga. App. 728, the court, in holding that employment of a person engaged in fishing on navigable waters was of local concern, emphasized that the fishing all took place in sight of land. The distance from

the shore was not considered, however, in *Johnson* v. *G. T. Elliott, Inc.*, 152 Va. 121, where the employment of an engineer of a small gasoline boat, used solely for fishing in local waters in connection with a local shellfish packing plant, was held to be maritime and not local.

In *Saltan Ry. Co.* v. *Department of Labor*, 277 U. S. 135, the assembling and breaking up of booms of lumber in connection with the business of a local lumber mill was held to be of local concern. But a contrary result was reached in *Beyerle* v. *Industrial Accident Comm.*, 75 Cal. App. 19, where the employment was similar save that the breaking of the booms involved the operation of an engine on a scow. Contrast also the recent decision in *Klump* v. *Industrial Comm.*, 29 N. E. (2d) 627 (Ohio), with the decision in *St. John* v. *Thomson*, 108 Vt. 66, discussed by the court below (R. 74).

These examples are merely illustrative of the encouragement to protracted litigation which would ensue from construing the Act to allow the independent judicial review as to the character of the employment contended for by respondent. In the past as much as four years has sometimes elapsed between the date of application for judicial review under Section 21 (b) and final disposition in the courts.[10] If payment of compen-

[10] See Brief for the Respondent, p. 31, in *South Chicago Co.* v. *Bassett*, October Term, 1939, No. 262.

sation is stayed by injunction, the claimant, though entitled to recover, may be denied the means of support in the interim. Such delay may make some compromise essential in order that the claimant may receive any effective compensation.[11]

2. When, together with the foregoing considerations, the policy of the Act is weighed in the light of familiar principles of judicial review, it seems evident that Sections 19 and 21 (b) should be construed to deny a review *de novo* of the deputy commissioner's findings with respect to the character of the employment. The problem in the border-line cases above referred to is to determine the "dominant characteristics" of the employment (cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 187) and the scope of review contemplated by the Act in such cases should be determined in accordance with "the obvious purpose of the

[11] In the unreported case of *Charles M. McCormack Lumber Co.* v. *Marshall* (W. D. Wash., July 6, 1937), the employer made application for review under section 21 (b) on October 31, 1932, and an interlocutory injunction was granted on January 28, 1933. On July 6, 1937, more than four years later, the district attorney consented to the entry of an order setting aside the compensation award. The consideration to the claimant for this agreement, if any, is not shown by the court's order. In *Lykes Bros.-Ripley Steamship Co., Inc.* v. *Sheppard* (unreported), decided November 13, 1935, the decree of the District Court (E. D. Tex.) expressly recites the consideration.

legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell* v. *Benson*, 285 U. S. 22, at 46.

Such purpose is clear from the face of the Act. Compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14 (b)). Where the right to compensation is controverted and an award is made by a deputy commissioner, a penalty of twenty percent is assessed for failure to make compensation within ten days after payment is due (Sec. 14 (f)). *Candado Stevedoring Corp.* v. *Lowe*, 85 F. (2d) 119 (C. C. A. 2d); *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. (2d) 446 (C. C. A. 9th). If the employer fails to make payment within thirty days after compensation is due, the deputy commisisoner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15 (b)); agreements for compensation without the approval of the Commis-

sion are prohibited (Sec. 16);[12] and the district attorney is directed to appear on behalf of the deputy commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21 (b)).

Unless the policy of Congress apparent from all these provisions is to be defeated in a large class of cases, the findings and conclusions of the deputy commissioner with respect to the character of the employment, supported by substantial evidence, should be held conclusive.

It is immaterial that the determination of the character of the employment involves the interpretation of a statute or the application of some relevant legal principle. Where supported by substantial evidence, administrative determinations have been held conclusive with respect to the questions whether a carrier was "an interurban electric railway" excluded from the coverage of the Railway Labor Act (*Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185); whether coal was "bituminous coal" as defined in the Bituminous Coal Conservation Act of 1935 (*Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 390, 400); and whether one carrier

[12] Section 8 (i) permits the Deputy Commissioner to approve settlements with the approval of the Commissioner in certain limited classes of cases. Subject to this exception section 16 forbids compromise of claims even with the approval of the Deputy Commissioner or of the Commissioner.

was "directly or indirectly controlled" by another so as to be excepted from the coverage of the Communications Act of 1934. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146. In each of these cases the administrative finding was treated as a "factual determination" (*Shields* v. *Utah Idaho R. Co., supra*, 180) though involving the interpretation of a statute.

The determinations of the Deputy Commissioner under the Longshoremen's Act are entitled to like finality. In *South Chicago Co.* v. *Bassett*, 309 U. S. 251, the deputy commissioner found that an employee was not "a member of a crew" excluded from the coverage of the Act under Section 3. The Court held (at 260) that the application of the provision turned on whether the employee was "naturally and primarily on board to aid in her navigation" and sustained the finding as one of fact supported by substantial evidence. No reason is seen for a different standard of judicial review where the inquiry is whether the employment has "direct relation to commerce and navigation." *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 144. The absence of any constitutional reason for a review *de novo* has already been shown. *Supra*, pp. 22–24).[13]

---

[13] It is even arguable that, in a case such as this, the Constitution, as distinct from the Act, would not require any review whatever of the deputy commissioner's conclusion on the issue whether a state act validly could apply. For since Congress might constitutionally have provided that the Act

It is not contended, of course, that every finding of a deputy commissioner on an issue of statutory coverage is conclusive. Under the Act the finding must be consistent with established principles and supported by substantial evidence. A finding, on the one hand, that the repair of a completed vessel is nonmaritime and local or, on the other, that the construction of a new vessel or the operation of a land business, having no relation to navigation or commerce, is maritime, could not be supported. But where the evidence discloses some relation to both a vessel and to a nonmaritime object or business and it is necessary to determine whether the "dominant characteristics" of the employment are maritime or local, a "rational basis" may be found for either conclusion. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146. In such circumstances, the established principles regulating the scope of judicial review and the evident purpose of the Longshoremen's Act both

---

should be applicable to all injuries occurring on navigable waters (cases, *supra*, p. 23), respondent has no constitutional right not to be covered by the Act, and, except with respect to constitutional rights, due process of law does not require that there be a judicial determination of questions of law any more than of questions of fact. *Reetz* v. *Michigan*, 188 U. S. 505, 507; *United States* v. *Ju Toy*, 198 U. S. 253; *Passavant* v. *United States*, 148 U. S. 214, 219, 222; and cases collected in the opinion in *Ex Parte Bakelite Corp'n*, 279 U. S. 438, 451-452 and in the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 77-81. For reasons stated in footnote 8, *supra*, p. 22, the decision in *Crowell* v. *Benson*, 285 U. S. 22, is inapplicable.

suggest that the determination of the deputy commissioner should be accorded finality.

III

THE CLAIM FOR COMPENSATION WAS PROPERLY FILED BY DECEDENT'S WIDOW IN HER OWN NAME

Respondent, in its brief in opposition to the petition for certiorari, raises the technical objection that, as the claim was filed by decedent's widow in her own name and not as "legal representative" of the decedent, the proceedings are void under Section 5 of the Act. Section 5, dealing with the exclusiveness of the liability of an employer, provides as follows:

> The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. * * *

A sufficient answer to respondent's contention is that it was first made on the appeal to the court below; it was not made before the Deputy Commissioner (see R. 13, 52) or District Court (see R. 1–6). The rule is well established that issues not raised before the Deputy Commissioner are considered as having been waived and cannot be asserted for the first time in the courts. *Maryland Casualty Co.* v. *Cardillo*, 107 F. (2d) 959 (App. D. C.); *Metropolitan Casualty Ins. Co.* v. *Hoage*, 89 F. (2d) 798 (App. D. C.); *Grain Handling Co.* v. *McManigal*, 23 F. Supp. 748 (W. D. N. Y.); *Liberty Stevedoring Company* v. *Cardillo*, 18 F. Supp. 729 (E. D. N. Y.); *Southern Shipping Co.* v. *Lawson*, 5 F. Supp. 321 (S. D. Fla.).

Respondent's argument that this issue is jurisdictional and can be raised at any time is contrary to the decisions of this Court.[14] The question does not go to the jurisdiction of the Deputy Commissioner and courts, but only raises the issue of capacity to sue. In *McCandless* v. *Furland*, 293 U. S. 67, 73–74, Justice Brandeis stated in reference to that question:

> But an objection to the plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate

---

[14] *Chapman* v. *Griffith-Consumers Co.*, 107 F. (2d) 263 (App. D. C.), cited by respondents (Br. in Opp., pp. 41-2) is entirely irrelevant to this issue. It concerns the interpretation of Section 33, and does not touch upon the construction of the term "legal representative."

> court. The rule is of general application and has been applied in the federal appellate courts to a variety of cases. To lack of capacity on the ground of infancy; on the ground that plaintiff was a married woman; on the ground that the husband was not entitled to sue in his own name for the death of his wife; * * * that the father was not entitled to sue for the death of his minor son, * * * The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court.

See also *O'Reilly* v. *Campbell,* 116 U. S. 418, 420; *McLaughlin* v. *United States,* 107 U. S. 526, 528.

In any event, respondent's contention is based on a mistaken construction of the Act. Section 5 deals with the exclusiveness of the employers' liability; it does not determine the proper party to file a claim. Section 12 provides that notice of death may be given "in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf," and Section 19 (a) provides that "a claim for compensation may be filed with the Deputy Commissioner in accordance with regulations prescribed by the commission," subject to the provisions of Section 13. Section 13, dealing with the time for filing claims, does not require that a claim must be filed by the

"legal representative." And the claim in this case was filed in accordance with the forms prescribed by the Commission for a claim by a widow. 20 CFR 31.5; Form No. U. S.-262. See appendix B, p. 46.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

CHARLES FAHY,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
H. G. INGRAHAM,
WALTER S. SURREY,
Attorneys.

OCTOBER 1941.

APPENDIX A

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 424 (33 U. S. C., Secs. 901 *et seq.*) are as follows:

SEC. 2. (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)

* * * * *

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in

place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * *

SEC. 12. (a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

* * * * *

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this Act is mentally incompetent or a minor, the provisions of subdivision (a) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven

days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the commission, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

* * * * *

SEC. 21. (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order

of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

APPENDIX B

Form US-262

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner ____ Administering Longshoremen's and Harbor Workers' Compensation Act.

LEAVE THIS SPACE BLANK

Case No. _____

Insurance Carrier's No. _____

Claim for Compensation in Death Case by Widow and or Children Under the Age of Eighteen

I hereby make claim for compensation arising out of the death of _____ who died on _____ 192__ at _____, as a result of injury sustained on _____, 192__, at _____ (Place where injury happened and name of vessel) in the employ of _____ (Name of employer) whose address is _____ (Street and number) (City or town) (County)

Deceased left the following children who were under 18 years of age at the time of his death:

NAMES	DATE OF BIRTH

These questions should be answered where the widow is claiming compensation.

Widow was born on _____ (Date) at _____ (Place)

Widow was married to the deceased on _____ day of _____ at _____ (Place where married)

by _____ (Name or title of person performing ceremony)

14 Last physician or hospital _____
(Name and address)

15 Name of undertaker _____ Address_____

16 Amount of undertaker's bill, $_____ Amount paid,

17 if any, $_____.

18 By whom paid _____
(Name) (Address)

Dated this _____ day of _____, 192__ _____
(Signature of claimant)

Address _____

AFFIDAVIT

State of _____,

County of _____, ss:

On this _____ day of _____, A. D. 192__, personally appeared before me the above-named _____ and made oath that the answers by _____ above named and subscribed are true.

[SEAL] _____

Notary Public.

Address _____

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. ~~926~~ 46

In The
Supreme Court Of The United States

OCTOBER TERM, 1940

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE McCLURE CO. PRINTERS STAUNTON VA.

TABLE OF CONTENTS

PAGE

Opinion of the Court Below 3
Jurisdiction 4
Statement of Case 4
Decedent's Contract of Employment and Duties 5
Business of Employer Local and Employees–Non-Maritime ... 5
Facts Relating to Decedent's Drowning 5
Decedent's Violation of Contract of Employment, Instructions and Duties 6
Evidence 6
Decedent's Duties 10
History of Claim and Suit 12
Argument 12
Want of Jurisdiction 12
Law 14
The 'Maritime But Local' Doctrine 14
This Court Has Decided Adversely to Petitioner's Contentions 22

TABLE OF CASES

PAGE

Alaska Packers Asso. v. Industrial Accident Com. 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656 19-36
Ayers v. Hoage 63 Fed. (2d) 364 29
American Ry. Co. v. Birch 244 U. S. 547, 56 L. Ed. 879 42
Brown v. Fletcher 210 U. S. 82, 52 L. Ed. 966 42
Crowell v. Benson 285 U. S. 22, 75 L. Ed. 598 17-22
Chapman et al. v. Griffith's Consumers Co. 107 Fed. (2) 263 at p. 267 41
Chicago R. I. & P. R. Co. v. Schendel 270 U. S. 611 42
DeWald v. Baltimore & Ohio R. R. Co. 4 Cir. 71 Fed. (2d) 810 27
DeFillippis v. Falkenberg 170 App. Div. 153, 155 N. Y. S. 761, 219 N. Y. 581, 114 N. E. 1064 30
Dennison v. Payne 293 Fed. 393 42
Edelweiss Gardens v. Industrial Co. 125 N. E. 260 30
Edwards v. Elliott 21 Wall. 532, 22 L. Ed. 487 34
Fidelity Cas. Co. of N. Y. v. Burris, 59 Fed. (2d) 1042 at 1043 21
Fazio v. Cardillo (1940) 109 Fed. (2d) 835 29

Ferry Co. v. Beers 20 How. 393, 15 L. Ed. 961.....34
Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 66 L. Ed. 321, 42 Sup. Ct. Rep. 157.....15-19
Hartford Accident & Indemnity Co. v. Cardillo (1940) 112 Fed. (2d) 11.....32
Interstate Commerce Com. v. Louisville R. R. Co. 227 U. S. 91-92, 33 S. Ct. 185.....22
Ingersoll v. Coran 211 U. S. 335, 53 L. Ed. 208.....42
Jeffers v. Foundation Co. 85 Fed. (2d) 24.....28
Lake Gorin Employers Liability Assurance Co. of London v. Cook, 266 U. S. 449, 69 L. Ed. 372, 45 Sup. C. Rep. 157...17
Leonbruno v. Chapman Silk Mills 229 N. Y. 470, 128 N. E. 711.....29
Motor Boat Sales, Inc. v. Parker 116 Fed. (2d) 789-796.... 3
Massman Const. v. Bassett, Dep. Comr, et als. (1940) 30 Fed. Supp. 813.....26
Millers Indemnity Underwriters v. Brand 270 U. S. 59 46 S. Ct. 194, 70 L. Ed. 470.....28
Morgan v. Hoage 72 Fed. (2d) 727.....30
McNicol, In re 102 N. E. 697.....31
Robertson v. Cease, 1878, 97 U. S. 646, 24 L. Ed. 1057.....18
Roach v. Chapman 22 How. 129, 16 L. Ed. 294.....27-34
Smith, Ex parte, 1876, 94 U. S. 455, 24 L. Ed. 207.....18
Sultan Ry. Co. v. Dept. of Labor and Industries of the State of Washington, 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820.....19-37
South Chicago Coal & Dock Co. v. Bassett, etc. (1940) 60 Sup. Ct. Rep. 544.....26-20
Scholtzhauer v. C. & L. Lunch Co. 134 N. E. 701.....30
Troxell's, Admr. v. Del Lac. & Western Ry. Co. 227 U. S. 586, 57 L. Ed. 537.....42
U. S. Casualty Co. v. Taylor 64 Fed. (2d) 521.....28
Wimmer v. Hoage 90 Fed. (2d) 373.....30-34
Wood Towing Co. v. Parker 76 Fed. (2d) 770.....43
Young v. Duncan 218 Mass. 346, 106 N. E. 1.....35

OTHER AUTHORITIES

Robinson on Admiralty, 1939, Chap. 3 p. 76.....14
Workmen's Compensation Act, 93 Chap. 4.....14
2 C. J. S., Admiralty, p. 98 Sec. 38.....27
Compensation Act (33 USCA Sec. 802).....31

No. 926

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW

The Opinion of the Circuit Court of Appeals (R. 69-78) is reported in 116 Fed. (2d) 789-796, (R. 68-78).

II.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the judgment of the United States Circuit Court of Appeals rendered January 6, 1941, under section 240 (2) of the Judicial Code as amended by Act of February 13, 1925, by a petition for writ of certiorari filed by the Solicitor General of the United States solely on behalf of E. V. Parker, a Deputy Commissioner of the United States Compensation Commission, praying for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals of the Fourth Circuit reported in Fed. (2d) 789-796, R. 78-79.

STATEMENT OF CASE

The respondent was a city retail merchant, operating its store at 3 West Grace Street, in Richmond, Virginia, and was engaged in selling outboard motors, small boats—none larger than the yacht class,—and maritime supplies of all kinds to cover the boats it handled (R. 20-21, 28-31, 49-51). Respondent did not service boats or do installation or repair work on boats or engines on navigable waters, the boats it sold to its customers being fully equipped and ready to go (R. 23, 24-25, 37-38, 41).

DECEDENT'S CONTRACT OF EMPLOYMENT AND DUTIES

The decedent was **"employed as a janitor and handy-man"** (Petition 3, R. 7) **and he was specifically "instructed not to go on boats" * * *, ride on boats, or perform any duties on navigable waters or any other kind of rivers,"** (R. 24, 28-31, 34-35, 36-39, 41-42, 45, 49-50). He was not employed "in maritime."

BUSINESS OF EMPLOYER LOCAL AND EMPLOYEES—NON-MARITIME

George W. Todd and Randolph Hobbs were the assistant managers of respondent's store (R. 20); W. Earl Lloyd was its mechanic and had charge of the shop (R. 28); Johnny Cooper was the mechanic's (Lloyd's) helper (R. 29, 30, 31, 37), and worked under him. Randolph Hobbs, on August 8, 1938, was in charge of the store (R. 34).

FACTS RELATING TO DECEDENT'S DROWNING

On August 8, 1938, Crown and his brother had built a "row boat" and came with it by respondent's store on their way to the James River to test it out, and talked with Hobbs, the store manager on that day, and Lloyd, the mechanic, about the purchase of one of two second-hand outboard motors from respondent. At the request of Crown it "was decided to let the motors go down to the river to be operated by him on the back of his boat" (R. 36), he having in

mind the purchase of one of them. Cooper, the mechanic's helper, was sent along to attach these motors to the Crown boat (R. 36-37). The decedent "was instructed to help lift those motors from the car (automobile) to the boat and from the boat back to the car,—to help load and unload them" (R. 22, 36-39, 40-42, 43, 46-47).

DECEDENT'S VIOLATION OF CONTRACT OF EMPLOYMENT, INSTRUCTIONS AND DUTIES

The decedent, **in violation of his contract of employment, his instructions and duties,** after he had delivered the outboard motors from the automobile to the end of the Crown boat on the bank of the river, and the motor had been attached to the end of the boat and it had been shoved into the river, voluntarily and "of his own accord" got into the front end of the boat and took the ride for his own pleasure and was sitting there with his face to the front (R., bottom 46) when the boat struck something in the muddy water, capsized, and he was drowned. He was not employed, ordered or required to get or be on the boat.

EVIDENCE

George W. Todd, a witness for claimant:
R. 21:

BY MR. PARRISH:

Q. "Who engaged the services of George P. Armistead, Jr., the deceased?"

A. "I don't know. I think he was hired by Mr. Fulton."

Q. "Mr. King Fulton, who is present today?"

A. "Yes, sir."

BY THE DEPUTY COMMISSIONER:

Q. "Are you still with the company?"

A. "Yes, sir."

Q. "You said the company engaged in dealing in maritime supplies of all kinds?"

A. "Yes, sir; to cover the boats we handle."

Q. "That means that you serviced boats?"

A. "What do you mean 'serviced boats?' "

Q. "Any kind of equipment they wanted to put on the boat, would you supply it?"

A. "No, sir; we didn't make a specialty of it. I don't know of any instance where we did installation work."

Q. "You sell the boats?"

A. "The boats we sell are ready to go."

Q. "Did you do any repair work after that?"

A. "No, sir; that was for the boat yards."

Q. "How often would your employees go aboard any boat; every day?"

A. "No sir; not every day. It was just a rarity that we got on boats. We haven't got any business getting on other people's boats."

Q. "Suppose a fellow wanted a compass or chart or some other equipment that you sell, would you deliver it?"

A. "No, sir; we don't have a delivery truck. The only thing was my car."

R. 38:

Q. "You didn't tell him what to do that day?"

A. "Not particularly that day, but George was instructed not to get on boats and he was particularly

instructed about that, but sometimes he might do some work on motors. We didn't want him working on the mechanic's work; didn't want people to see him working on motors."

Q. "He would have to get in the boat, if his job was to lift it in the boat?"

A. "Not particularly. The stern was pulled on the shore and the motor was attached to it."

BY MR. FULTON:

Q. "You said he was given specific instructions. Did he have any authority or instructions to ride on boats, perform any duties on navigable rivers, or any other kind of rivers?"

A. "No, sir."

R. 38-39:

BY MR. PARRISH:

Mr. Hobbs testified:

Q. "Generally, the purpose was for him to assist in helping to take the motors and putting them in the car from the shop and out of the car on the boat and back off the boat in the car and back to the shop?"

A. "Yes, sir."

S. King Fulton:

R. 49-50:

Q. "Did you hire this boy, George P. Armistead, Jr., who got drowned on August 8, 1938?"

A. "I did."

Q. "How long had he been with the Company?"

A. "I think since 1936 or 1937; two or two and one-half years."

Q. "What were his duties?"

A. "He was a porter. We had a porter that lived

on the premises, but when George took the job, he was married, and he did not live on the premises. He was a porter and operated under my supervision and in December 1937, at which time I went to Washington—

Q. "Were his duties ever changed? You went backward and forward."

A. "No, sir."

Q. "What instructions did you give him and other employees, generally, when they delivered things, about going in other people's boats?"

A. **"George was cautioned never to go into a boat** or have anything to do with a boat or motor, as explained by Mr. Hobbs. The class of boat we sell our customers does not demand a sale's technique. I had very rigid rules in regard to handling boats. Prior to November 1937 I laid the law down very rigidly in regard to that. I think everybody in the store knew my ruling."

Q. "What was your ruling; not to go out in rivers or boats for anybody?"

A. "Yes, sir."

BY MR. PARRISH:

Q. "When did you lay down that law? Prior to December 1937 when you went to Washington, wasn't it?"

A. "Yes, sir."

R. 51:

BY MR. FULTON:

Q. "Was he employed to work on a boat?"

A. "No, sir."

DECEDENT'S DUTIES

John Samuel Cooper:
R. 45:

BY MR. FULTON:

Q. "What were George Armistead's duties?"
A. "Wash up motors and polish them and general helper, and in the mornings, sweep in the store."
* * *
Q. "Did he have any duties in running a motor on out in the water?"
A. "Not to my knowledge."
Q. "Did you instruct him to get in the boat or did he go on his own accord, for a pleasure ride?"
A. "He went on his own accord."
Q. "You were up there when you were told to take the motor down and he went along to help unload the motors from the trailer and attach them to the boat and take them and put them back in the trailer?"
A. "Yes, sir."
Q. "And they were his sole duties?"
A. "Yes, sir."
Q. "You heard what was said to him?"
A. "Yes, sir."
Q. "You never gave him any and you didn't hear anybody give him any duties to go on water?"
A. "Not to my knowledge."

R. 46:

BY MR. FULTON:

Q. "You didn't tell him to get in the boat?"
A. "No, sir."
Q. "He had no instructions to operate the boat in the river?"

A. "No, sir."

* * *

R. 47:

BY MR. FULTON:

Q. "Did you give him any orders to sit in front?"

A. "No, sir."

Q. "There was a seat up front and he was sitting there?"

A. "Yes, sir."

Welford Earl Lloyd:
Id. R. 40—middle of page.

William Crown:
R. 41-42:

Q. "Was George Armistead told by you or by Mr. Johnnie Cooper, the boy that was from the Motor Boat Sales down, to get in your boat and ride, or was he ordered and directed not to?"

A. "Yes, sir."

Q. "Did he have any work to do on the boat?"

A. "None at all."

Q. "Were you present when he was told to go down with those motors?"

A. "Yes, sir."

Q. "And you were present when they got down there?"

A. "Yes, sir."

Q. "And you never heard anyone tell George to get in the boat and ride?"

A. "No, sir."

Q. "Was it your boat that capsized in the river when George was drowned?"

A. "Yes, sir." * * *

HISTORY OF CLAIM AND SUIT

No administrator of decedent has ever been appointed and he has never made any claim. Notice of the claim was filed by and in the name of Jessie B. Armistead, widow of decedent (R. 12-13), and not by or on behalf of the "legal representative" of decedent. The suit was brought by respondent in the United States District Court to set aside the award of the Deputy Commissioner, and Jessie Booker Armistead, the widow of decedent, and her three infant children, Dorothy Marion Armistead, George Percell Armistead, III., and William Berkley Armistead, intervened as parties defendant, and Aubrey N. Heflin was appointed guardian ad litem for the infants (R. 54). Neither they nor the "legal representative" of decedent have applied to this Court for a writ of certiorari to the judgment of the Circuit Court of Appeals. (Longshoremen's and Harbor Workers' Compensation Act, section 5).

ARGUMENT

I.

WANT OF JURISDICTION

Petitioner, under 1. and 2. and note 1, page 2, and under "Reasons For Granting the Writ," pages 7-11, contends:

That the finding of the Deputy Commissioner that the decedent was engaged in maritime employment at the time of his death is conclusive if support-

ed by substantial evidence and if the question whether decedent was engaged in maritime or local employment is one for the independent determination of the Courts, decedent's employment was maritime and not local and that recovery may not validly be provided by state law.

These contentions are untenable, because

1. The findings of the Deputy Commissioner that decedent was engaged "in maritime employment" is not supported by substantial evidence, since all the evidence shows that the decedent was not employed "in maritime" and that he had no duties to perform on navigable waters, and that when his death occurred by drowning he was at a place on James River where he had not been employed, ordered or required to go and was there in violation of both his contract of employment and specific "instructions not to go upon or work on boats on navigable or any other rivers."

On this question, the Deputy Commissioner himself found that the decedent's death resulted from drowning on the James River **"while he was employed as a janitor and handy-man." R. 7.**

That decedent was so employed is shown by all of the evidence. See pages 4-7, supra of this Brief. Decedent's contract of employment and the work he was specifically ordered to do on the day he was drowned were non-maritime. In these circumstances, even though his injury and death occurred on navigable waters, "it is, at least prima facie 'local' and within the operation of state law"—a purely local matter not concerned with commerce or navigation and not within admiralty jurisdiction.

LAW

In Robinson on Admiralty (1939, Chap. 3, p. 76), the learned author says:

> "Mere locality, therefore, is not enough to bring a case under the Longshoremen's and Harbor Workers' Act. Congress has made a statute designed to cover the job hazards of **maritime workers while laboring on the water.** The requirement is that maritime character in the work coincide with locality of the injury."

At page 93, chapter 4, Workmen's Compensation Act, the learned author says:

> "(14) State Compensation Acts may apply to maritime injury if the matter is 'maritime but local'."

Id. p. 101:

"THE 'MARITIME BUT LOCAL' DOCTRINE

> "14. The Supreme Court developed a doctrine that matters 'maritime but local' may be left to the states and by this exception many cases of maritime injury lex loci are compensable under state compensation acts. In 'local' matters uniformity is not required.
>
> "The 'local aspect of the matter has been made to depend on the **character** of the injured man's work. If the work is **maritime,** and the locus also **maritime,** the state act is excluded from operation. For non-maritime workers the state act may apply even though the place of injury is in fact on navigable waters."

"The test for the exclusion of state acts was not whether or not the injury occurred upon the maritime waters. This would be clear-cut cleavage. The Supreme Court, however, now made the simple test of mere 'locality' of no avail."

Id. pp. 103-105:

"The nub of the 'local exception' doctrine, of course, lies in the court's definition of 'local.' 'Local' does not have to do with locality; all the cases are those of an injury which is localized on the waters, not on the land. The definition has become bound up with the character of the man's work. By the mere test of locality the injury is "maritime in all the cases. This is the common factor. The character" of the work is the variant. If the work is 'maritime' the state compensation acts are excluded; if it is non-maritime, the state compensation act is applicable. The 'local' doctrine was explicitly set forth in **Grant Smith-Porter Ship Co.** v. **Rohde.** There the shipbuilder had **launched** a newly constructed ship, still in an unfinished state, undelivered and uncommissioned. But it was afloat in navigable waters when Rohde, who was at work on it as a carpenter or joiner in the builders' employ, was hurt. He sued in admiralty, alleging the shipbuilding company's negligence. The employer relied upon the State Compensation Act. By its provisions the remedy it gave was exclusive. The court said: 'The 'contract' for constructing the 'Aloha' was 'non-maritime' and although the incompleted structure was lying in navigable waters, neither Rohde's general employment nor his activities had any direct relation to navigation or commerce. Under such circumstances regulation of the rights, obligations, etc., by a local rule would not necessarily work material prejudice to

any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law.' Justice McReynolds referred to the Garcia decision and said: 'The present case is controlled by that case's principal' and 'this conclusion accords with **Southern Pacific Co.** v. **Jensen.**' Rohde's suit in admiralty failed and he was remitted to his remedy under the state compensation act. The thesis that if injury may be labeled 'local' the state law is made applicable was thus established." * * *

Id. p. 106:

"From the authorities we deduce: * * *

(3) If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of the admiralty unless (a) the contract is of merely 'local concern'; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters, when and only when the service is within (a), (b), and (c) above. (5) If, however, the injury occurs on navigable waters, but in the performance of a non-maritime contract, it is, at least prima facie, local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

Id. pp. 107-108:

"In the **Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England,** v. **Cook,** the Fifth Circuit Court of Appeals had before it the injury of a man employed by the Ford Company primarily as a mechanic assembling automobile parts, which, as they came in on Ford ships, were unloaded by the employees of the assembling plant. Cook, while engaged in unloading, was injured on board one of the ships by what the court called 'pure accident', so that unless under the State Compensation Act there was no recovery as for a maritime tore. The Circuit Court applied the State Act, saying: 'We think * * * that the matter of unloading these ships * * *at rare intervals was 'of mere local concern'."

Id. 110: At the end of note 67, it is said:

* * * "The Act does not apply to **non-maritime employment upon navigable watets.** Injuries occurring in the latter status no doubt may be validly compensated under a State law if it so provides."

Id. pp. 119-120:

"Knudson's case, **Crowell** v. **Benson,** the Supreme Court distinguished 'jurisdictional facts' and **excepted them from the administrative finality** otherwise recognized."

At page 121, the learned author under "OCCUPATIONS WITHIN THE APPLICATION OF THE HARBOR WORKERS' AND LONGSHOREMEN'S ACT," said:

"Not only must the locality be settled. The man's occupation at the time of his injury must also be determined."

And at page 122:

"The qualification is this: even though the employee is injured while engaged in work on navigable waters, his rights are to be determined under the state workmen's compensation act, if the enterprise upon which he is at the time engaged is a purely local matter and not concerned with commerce or navigation." * * *

Id. p. 123:

"In re Herbert Chief Justice Bugg for the Massachusetts Supreme Court held that the Compensation Act of the state was applicable in curious circumstances. Herbert worked on a scow, owned by the Coleman Disposal Company, and used to ferry garbage to an island two miles away in Boston Harbor. Herbert's job was to sweep the scow after its unloading, and he was at work while it tied up at the island when he fell overboard. After reciting the standard Supreme Court decisions the court said: 'It seems to us difficult to conceive of anything more local in its general nature. * * * It does not appear that the deceased had any work directly connected with maritime affairs!"

See also pp. 131-132, 174.

"There is no presumption in favor of jurisdiction. Ex parte Smith, 1876, 94 U. S. 455, 24 L. Ed. 207. It must affirmatively appear. **Robertson** v. **Cease,** 1878, 97 U. S. 646, 24 L. Ed. 1057."

> "**In Grant Smith-Porter Co.** v. **Rohde,** (1927) 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, the proceedings was to recover an award under a Workmen's Compensation Act from a shipbuilder for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette river (a navigable river), the court held, the **contract** for constructing the vessel was **'non-maritime,' and although the uncompleted** structure upon which the accident occurred **was lying in navigable waters, neither Rohde's general employment nor his activities at the time had any direct relation to navigation."**

This Court held, in **Alaska Packers' Association** v. **Industrial Accident Commission,** 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656, a person engaged by a fishing and canning Company as a seaman, also as a fisherman, **and for general work in and about a cannery,** was injured while endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock. This Court held that that injury, even if within admiralty jurisdiction, was of such a "local character" as to be cognizable under a state compensation law, a ruling which would not injure the characteristic features or uniformity of the admiralty law.

Again this Court held, in **Sultan Railway Co.** v. **Department of Labor and Industries of the State of Washington,** 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820, an award for injuries under the Workmen's Compensation Law of Washington * * * was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms which had been towed on

a river to a sawmill and the guiding of the logs to a conveyor **extending into the river** by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an "incidental relation to navigation." The rights and obligations of the employees and their employers could well be regulated by "local" law, which would not work material prejudice to the characteristic features of the general maritime law.

In **South Chicago Coal & Dock Co., et al.** v. **Bassett, Deputy Commissioner, United States Employees' Compensation Commission** (1940), 60 Sup. Ct. Rep. 544, this Court held:

> Syl. 1. "The general scheme of the Longshoremen's Compensation Act was to provide compensation to employees engaged in 'maritime employment,' except as stated in the act, for disability or death resulting from injury occurring upon navigable waters of the United States, where recovery through workmen's compensation proceedings might not validly be provided by state law."
>
> Syl. 8. "The purpose of the Longshoremen's Compensation Act was to provide compensation for **a class** of employees that worked on vessels in navigable waters, who although they might be classed as 'seamen' were **regarded as 'distinct** from members of a crew,' being employees whose service was that of laborers of the sort performed by longshoremen and harbor workers as distinguished from those employees on the vessel who were naturally and primarily on board to aid in her navigation.

"The question was required to be determined by the actual duties of the workman." (Syl. 9).

Measured by this test there is absolutely no evidence in the record that the decedent's contract of employment was in maritime or that his duties as "janitor and handy-man" or his instructions required him to go upon or do any work on boats on navigable waters or rivers of any kind.

As was said by the United States Court of Appeals of the District of Columbia, in **Hartford Accident & Indemnity Co. vs. Cardillo,** cited and quoted from on pages 14-16, "to entitle an employee to compensation under the Federal Act, the employees' employment and work had to require him to be in the place of danger and expose him to the risk or hazard—arise out of and in the course of the employment."

In **Fidelity Cas. Co. of N. Y.** v. **Burris,** 59 Fed. (2d) 1042 at 1043, the Court said:

> "(1) It is first insisted that both the lower court and ourselves are bound by the findings of fact of the deputy commissioner, but it is sufficient to say as to this that we have many times held that, upon a review of the record made before the deputy commissioner, out duty is to determine whether his order was or was not in accordance with law, and this depends upon whether the testimony taken before the deputy commissioner will sustain his finding." * * * "As we view the matter, there is no evidence on which to sustain the deputy commissioner's finding."

THIS COURT HAS DECIDED ADVERSELY TO PETITIONER'S CONTENTIONS

In **Crowell** v. **Benson** (1932), 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285, Chief Justice Hughes delivering the opinion, at page 287 said:

> "(1) First. The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States,' if recovery 'through Workmen's Compensation proceedings may not validly be provided by State law,' and it applies only when the relation of master and servant exists."

Id. Note 1, page 288; L. S. & H. W. Comp. Act 21 (b).
R. 292:

> "The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to preserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence,' or where the hearing is 'inadequate,' or 'unfair,' or arbitrary in any respect. **Interstate Commerce Commission** v. **Louisville R. R. Co.**, supra, at pages 91, 92 of 227 U. S., 33 S. Ct. 185; **Tagg Bros. & Moorhead** v. **United States**, supra."

Id. 294-295.

"What has been said thus far relates to the determination of claims of employees 'within the purview of the Act.' A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. * * *

* * * "In the present instance, the Congress has imposed liability without fault **only where the relation of master and servant exists 'in maritime employment,' and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of the enactment."** * * * "It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, **does not require the conclusion that there is no limitation of their use,** and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do de-

pend, upon the facts, and finality as to facts becomes in effect finality in law."
* * *

Id. 296:

"In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved." * * *

Id. 297:

* * * "In the absence of any provision as to the finality of the determination by the deputy commissioner of the 'jurisdictional fact of employment,' the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed." * * *

"We think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply." * * *

The quotation in the petition, the pages 10-11 from **Crowell** v. **Benson** (pp. 46-47) refers to cases which arise with respect to injuries to employees "within the purview of the Act" and has no application to the instant case and does not support petitioner's contentions. This is shown from the language of the Court in **Crowell** v. **Benson,** 285 U. S. page 46, immediately preceding the quotation, paragraph (4), 52 S. Ct., top of page 291; which language the learned Solicitor General no doubt inadvertently overlooked, which reads:

> "(4) Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final."

As pointed out supra, all the evidence shows that the decedent was not an employee within the purview of the Act.

As said in **Crowell** v. **Benson,** at 292 Supra:

> "The Act is made to facilitate the exercise by the Court of its jurisdiction to **deny effect to any administrative finding without evidence,** or, **contrary to the indisputable character of the evidence,** * * * or arbitrary in any respect."

In **Massman Const. v. Bassett, Dep. Comr., et al** (1940), 30 Fed. Supp. 813, the Circuit Court of Appeals said:

> "**The main point urged by plaintiff** in its effort **to set aside the award** of the Federal Commission **is that the United States Employees' Commission was lacking in authority to entertain the claim of defendants, because the deceased was not engaged 'in maritime services' at the time of the accident which resulted in his death.** (One of questions here). (Parenthesis ours).
>
> "(1) **The statute has been interpreted as requiring the Court to make an independent examination of the evidence to ascertain** (1) whether the relation of master and servant existed, and (2) whether the injury occurred upon navigable waters of the United States. **Crowell** vs. **Benson**, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598; **South Chicago Coal and Dock Co.** v. **Bassett**, 7 Cir., 104 F. 2d 522. **Such a finding is essential to jurisdiction to make any award under the Act.**
> * * *
>
> "Section 903 of the statute provides, in part, that: 'Compensation shall be payable under this chapter in respect of disability or death of an employee, but **only** if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and **if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.** * * *'
>
> "Section 902 (4) states: 'The term 'employer' means an employer any of whose **employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)'**"
> * * *

"(2, 3) The Longshoremen's and Harbor Workers' Compensation Act **was designed to provide for maritime workers** a remedy similar to that provided by state compensation laws. **Crowell** v. **Benson,** supra; **DeWald** v. **Baltimore & Ohio R. Co.,** 4 Cir., 71 F. 2d 810." * * *

"(4) The enactment of this statute rendered ineffectual state compensation laws, in so far as they undertake to provide compensation and **relief to workmen engaged 'in maritime' employment upon navigable waters. Was the deceased so employed?**

"The plaintiff employer had the contract to erect a dam across the Mississippi River" * * * "and was engaged in that undertaking. **The deceased employee at the time of the occurrence was working on that project, and was standing upon the ground in the bottom of the cofferdam in the river.**

"(5-7) **A maritime contract is a contract which relates to the actual business of navigation. A contract for building** a ship or **supplying material** for its construction **is not a maritime contract** for it does not deal with the use of the vessel upon navigable waters. **Roach** v. **Chapman,** 22 How. 129, 16 L. Ed. 294; 2 C. J. S., Admiralty, page 98, Sec. 38. **Agreements to provide mere facilities for navigation are not maritime. Hence plaintiff's contract to build the dam was a matter of local concern and not within the admiralty jurisdiction.**

"(8, 9) **Maritime service has some direct relation to a vessel employed in trade, commerce, or travel upon navigable waters."** * * * "The work of the deceased on the land in a cofferdam was not service performed 'upon navigable waters,' and it was **not maritime** in its nature because it was the design of the project to provide

a nine foot channel as an aid to navigation. The improvement of the channel may aid navigation, so may the building of a ship, **but neither is directly a part of any undertaking to carry on trade, commerce, or transportation upon public waters.** The Sirius, D. C. **65 F,** 226; 38 C. J. 1192.

"In **Grant Smith-Porter Ship Co.** vs. **Rohde,** 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, a carpenter employed on a ship nearly completed, launched in navigable water, was not engaged in maritime employment because his service had no direct relation to commerce or navigation.

"In **Miller's Indemnity Underwriters** vs. **Braud** et al, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, a diver engaged in removing submerged timber from a navigable river to aid navigation was not employed in maritime service.

"In **Sultan Railway & Timber Co.** v. **Department of Labor, etc.,** 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820, it was held that workmen engaged in assembling saw logs in booms for towage elsewhere were not in maritime employment, but in service of local character and concern.

"In **United States Casualty Co.** v. **Taylor,** 4 Cir. **64,** F. 2d 521, it was determined that a workman engaged in building of a new ship launched but not completed **was not in maritime service and state compensation law applied.**

"In **Jeffers** v. **Foundation Co.,** 2 Cir., 85 F. 2d 24, it was held that a diver employed to help in building a pier of a bridge across the Ohio River injured while standing inside a cofferdam was not entitled to recover under the Longshoremen's Act because he was not upon navigable waters at the time of the accident.

"(10) The cases give expression to the doctrine by which the present controversy must be

determined. **The conclusion to be drawn is (1) that the deceased at the time of his injury was not employed upon navigable waters; (2) that he was not engaged in maritime employment;** (3) and that the Compensation Law of Missouri **validly furnished a mode of redress."**

* * *

"Concluding as we do that Harold Reid Bolting **was not engaged in maritime employment, it follows that the United States Employees' Compensation Commission was without authority to enter the award in question."**

II.

The writ should be denied also because:

The death of decedent did not result from an injury which "arose out of and in the course of his employment."

In **Fazio** vs. **Cardillo,** et al (1940) 109 Fed. (2d) 835, at page 836, the Court of Appeals for the District of Columbia held:

"**Ayers** vs. **Hoage** 63 Fed. (2d) 364, we said 'that an injury **arises out of the employment' when it occurs 'in the course of the employment and as the result of a risk involved in or incidental to the employment or to conditions under which it is required to be performed,** and we added, **that the fact that the injury is contemporaneous or co-incident with employment is not alone a sufficient basis for an award. We adhere to what we said there,** and in this view cases like * * * **Leonbruno** vs. **Champlain Silk Mills,** 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522,

(naming them), are either **not** in point or state the doctrine more broadly than we are willing to accept." * * *

"In the instant case the evidence **abundantly** establishes that **appellant's injury** grew out of **'horseplay,'** whether begun by him or Smith, **happened at a time when he had stepped aside from his employment.** * * * Considered in this light, the Deputy Commissioner's finding was correct and is sustained in **Wimmer** vs. **Hoage,** 67 App. D. C. 128, 90 Fed. (2d) 373, and **Morgan** vs. **Hoage,** 63 App. D. C. 355, 72 Fed. (2d) 727; and outside of this jurisdiction by **Edelweiss Gardens** vs. **Industrial Commission,** 290 Ill. 459, 125 N. E. 260; **Scholtzhauer** vs. **C. & L. Lunch Co.,** 223 N. Y. 12, 134 N. E. 701, and **DeFillippis** vs. **Falkenberg,** 170 App. Div. 153, 155 N. Y. S. 761, affirmed 219 N. Y. 581, 114 N. E. 1064."

In the instant case all the evidence shows that decedent, George P. Armistead, Jr., **"stepped aside from his employment"** and **of his own accord and for his gratification was taking a ride in Crown's boat;** and under the Longshoremen's and Harbor Workers' Compensation Act, **awards are subject to the fundamental limitation that an employer is not to be subjected to liability for acts which do not "arise out of and in the course of the employee's employment in maritime." If such act takes him to a place he is not employed, directed, or required to be, this of itself is "outside of and not in the course of his employment,"—DeFillippis** vs. **Falkenberg,** 219 N. Y. 581, 114 N. E. 1064.

In **Morgan** vs. **Hoage** (July, 1934), 72 Fed. (2d) 727, the Deputy Commissioner found that the injury from which Morgan died **did not occur "in the course**

of his employment," and rejected the claim. The Court of Appeals of the District of Columbia, affirming the judgment of the lower court, at page 278 said:

> "In section (2) of the Compensation Act (33 USCA Sec. 902) it is provided: 'The term 'injury' means **accidental injury or death arising out of and in the course of employment.'** In In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, it is said: **"In order that there may be recovery the injury must both arise out of and also be received in the course of the employment. Neither alone is enough."**

In **Wimmer** vs. **Hoage,** 90 Fed (2d) 373, Wimmer, the claimant, was a salesman in the employ of a motor company the Deputy Commissioner **declined** to award compensation, holding that, **although the injury was sustained while the claimant was in the employ of the employer, claimant failed to prove that it "arose out of the employment."** The case was appealed to the United States Court of Appeals and it affirmed the holding below, and at page 374, said:

> "First. Because, **in leaving the automobile** and * * * **going in search of cigarettes for the personal gratification of himself and his companion, claimant placed himself in a position where the injury he sustained did not arise out of his employment, and this is true because in the circumstances there was wholly lacking a causal connection between the conditions under which the claimant was required and expected to be about the work of his employer and the resulting injury."** * * * "In other words, the injury,

to be compensable, must 'arise out of' a risk connected with the employment **and flowing from it as a rational consequence.** McNichol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. * * *

"But in this case we have no occasion to go farther than to say that if an employee," * * * "leaves the course of his employer's business, even momentarily, and while engaged in a mission of his own is assaulted **either with or without justification, the resulting injury is not covered under the term—injuries arising out of and in the course of his employment."**

In **Hartford Accident and Indemnity Co.** vs. **Cardillo,** (1940), 112 Fed. (2d) 11, the Court of Appeals for the District of Columbia reviewed the evidence and made an "independent determination" for itself and, at pages 13-14 (3-5), held:

"That an employee's employment and work has to require him to be at the place of danger and expose him to the risk or hazard, and that if an injury results therefrom then the injury arises out of and in the course of the employment." Citing **Fidelity & Casualty Co. of N. Y.** vs. **Burris** supra.

The Court there said:"if an employee in the course of his employment has to pass along the public streets and thereby sustains an accident by reason of the risk incident to the street, the accident arises out of as well as in the course of employment. * * * In other words, the work increases the employee's exposure to the risks of the street whenever it requires his presence upon it. * * * The street merely replaces the factory as the working environment. It is not the pe-

culiar nature of the environment or the risk,* * *, but the fact that the work brings the worker within the orbit of whatever danger the environment affords that is important. * * *

"It is stated by Cordozo in **Leonbruno** vs. **Champlain Silk Mills** (1920), 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 52:

'The claimant was injured not merely while he was in a factory **but because he was in a factory** * * *. Not the particular or peculiar character of the associations and conditions, but that the work creates and surrounds the employee with them is the basic thing. * * * The test of liability is the relation of the service to the injury, the employment to the risk.' * * *

"Not that the act is in the line of duty, or forwards the work, or creates special risks, but that the work brings the employee within its peril makes it, for purposes of compensation, part of the work, * * * brings the claimant within the range of peril by **requiring his presence there when it strikes.**"

In the instant case all the evidence shows that neither the decedent's contract of employment, his orders or directions required him to go upon or do any work on the Crown boat on James River or any other river—nor required his presence at all on the river or at the place at the time he was drowned.

III.

The writ should also be denied, because:

The Motor Boat Sales, Incorporated, Employer, was not engaged in maritime business;—decedent was not employed in maritime employ-

ment; his employment and work were purely of local concern, and might have been validly provided for by State law; nor was he working at all or engaged in doing any work he had been employed, directed or required to do at the time and place he was drowned; he had no duties that took or carried him on to navigable waters.

In **Wimmer** v. **Hoage,** 90 Fed. (2d) 373, The C. C. A. said:

> "It is well settled that **supplying material or equipment to be used in building a boat or ship is not a maritime business or a maritime contract; Ferry Co.** vs. **Beers,** 20 Howard 393, 15 L. Ed. 961; **Roach** vs. **Chapman,** 22 Howard 129, 16 L. Ed. 294; **Edwards** vs. **Elliott,** 21 Wall. 532, 553, 557 22 L. Ed. 487; The Winne Bags, 205 U. S. 354, 363, 27 Sup. Ct. 590, 51 L. Ed. 836."

In **Ferry-Beers** cited supra this Court, at page 961, 15 L. Ed., said:

> "So far from the **contract being purely maritime,** and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land."

In re Herbert (1933) 283 Mass. 348, 186 N. E. 554, cited supra, the proceeding was to recover compensation under the Massachusetts Workmen's Compensation Act for the claimant, Mildred Herbert, dependent daughter of deceased, **employee working on a scow used by employer to carry garbage over navigable waters. Herbert, the decedent employee, had quarters on the scow and slept there except that**

when it was tied up at Dorchester he usually slept at home. At the time of the accident the scow was tied up at the wharf on Spectacle Island, and Herbert had been seen sweeping the deck of the scow and fell overboard and was drowned in navigable water. Chief Justice Rugg, at page 554, said:

> "Unless the facts bring the case within the exclusive jurisdiction of maritime law, all rights, remedies and obligations of the parties must be determined in accordance with the (state) workmen's compensation act. Young v. Duncan, 218 Mass. 346, 106 N. E. 1." (Parenthesis ours).
>
> * * * "The only point is whether it is permissible to grant relief by that act under the decisions of the United States Supreme Court as to the exclusiveness of admiralty jurisdiction. There is nothing in our own decisions to stand in the way. Gillard's Case, 244 Mass. 47, 138 N. E. 384; Toland's Case 258 Mass. 470, 155 N. E. 602. Doubtless the accident here in question was maritime in nature, at least in some aspects. It occurred upon navigable waters sometimes said to be the test whether it is of admiralty cognizance." (citing cases) * * * "Recent authoritative decisions have laid down the principle however that where facts disclose a situation of mere "local" concern where regulation by State statutes will not materially prejudice essential features of general maritime law, local compensation acts may be operative," Grant Smith-Porter Ship Co. vs. Rohde, supra) and the United States Supreme Court, after reciting the facts, said, "it cannot properly be said that they (employer and employee) consciously contracted with each other in contemplation of the general system of maritime law. * * * Under such circumstances regulation of the rights, obligations and conse-

quent liabilities of the parties, as between themselves, by a 'local rule' would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. "In **Miller's Indemnity Underwriters** vs. **Braud**, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, recovery was permitted under a State workmen's compensation act for the death of a diver who had submerged himself from a floating barge anchored in a navigable river for the purpose of sawing off timbers from an abandoned set of ways which had become an obstacle to navigation. It was said at pages 64-65 of 270 U. S. 36, S. Ct. 194, 195: 'In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend **save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law.**'"

The Massachusetts Court referred to the case of **Alaska Packers Association** vs. **Industrial Acc. Co.**, 276, U. S. 467, and said:

> "Even if the cause of action was within admiralty jurisdiction, the work was not 'so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really 'local' in character.'" ....

The Supreme Court of Mass. then (186 N. E. at 255 in clause 3) said:

> "It seems to us **difficult to conceive of anything more local in its general nature** than sweeping the deck of a scow used in the scavenger business of a great city, moving only when towed and then only a very short distance and within the territorial limits of the municipality. **It does not appear that the deceased had any work directly connected with maritime affairs.** We are of opinion, therefore, that the facts in the case at bar bring it within the principle declared in the decisions of the Supreme Court of the United States already quoted, **to the effect** that the decedent was engaged in a matter of **mere local concern and that its regulation by the compensation act 'will work no material prejudice to any characteristic feature of the general maritime law.'** "

In **Sultan Ry. & Timber Co.** vs. **Department of Labor and Industries,** 277 U. S. 135, "the injuries arose out of **employment on a navigable river in assembling logs in booms for towage,**" the Court said:

> "Recovery was permitted (under the State Act) it being said that 'where **the employment, although maritime in character, pertains to local matter, having only incidental relation to navigation and commerce, the rights,** obligations and liabilities of the parties as between themselves, **may be regulated by local rules** which do not work material prejudice to the characteristic features of general maritime law or interfere with its uniformity.' "

OPINION OF COURT BELOW

The Circuit Court of Appeals of the Fourth Circuit, 116 Fed. (2d) 789-794 at page 790, after careful examination of the record, evidence and cases, held that the decedent's contract of employment was not in maritime; that he was not employed to work on boats or navigable waters, and "had been repeatedly and specifically cautioned and instructed that he was not to get on boats, ride in boats or perform any services on navigable waters," and that he was employed as a "janitor and handy-man," as did the Deputy Commissioner and the District Court; and that his employment was not so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. Citing Alaska Packers' Ass'n. v. Industrial Accident Comm., 276 U. S. 467, 469, 48 S. Ct. 346, 72 L. Ed. 656, and saying:

> "We are forced to the conclusion that Armistead's employment at the time of his death was strictly local and thus without the scope of the Act."

The fact of Armistead's contract of employment, instructions and directions given him are jurisdictional facts and are essential conditions precedent to the right to make the claim for compensation, and the Deputy Commissioner's determination of those facts is not final, and the Circuit Court of Appeals in determining whether the compensation order and award were in accordance with law, may determine

the jurisdictional facts as to whether the decedent was employed "in maritime employment" and whether the finding and order of the Deputy Commissioner and the judgment of the District Court were in accordance with law. **Crowell** v. **Benson,** supra.

As was said by this Court in **Ferry Co.** vs. **Beers** supra, so it is in the instant case as to Armistead's contract of employment,

> **"So far from the contract being purely maritime and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land."**

The argument made in note 3, page 7 of the petition, that decedent's "contract of employment, duties and directions, and the "specific instructions" given not to get in boats or go upon or do any work on navigable rivers" could be disregarded by the Deputy Commissioner, it is respectfully submitted, is wholly untenable, and is not supported by any substantial evidence in the record, nor by the decided cases.

The Circuit Court of Appeals rightly held (Op. bot. p. 790) that "the boat corporation did not service boats and did not do repair work on boats, engines or motors on navigable waters," and that the "occasional matters" referred to in note 3 as having been done by other employees did not make or constitute them employees "in maritime employment." Such other employees "rarely" went upon boats on rivers and when they did they went for their own pleasure and at the request of the owners of the boats to make

minor adjustments for such owners, **and not for respondent.** This is shown by all the evidence. (R. 23-25, bot. p. 33-34, 50-51). This did not make them "employees in maritime," nor did it make the decedent an "employee in maritime."

It is respectfully urged that decedent by violating his contract of employment and the directions **"not to go on boats or navigable waters,"** could not change his contract of employment as "janitor and handyman" or enlarge the character and kind of work he was employed, ordered and directed to do.

Nor can a Deputy Commissioner make a contract for and between the employer and employee, and by disregarding all the evidence convert a "non-maritime employee" into a "maritime employee."

It obviously cannot be the law that an employee employed in "non-maritime employment" can convert his employment into "maritime employment" by breaking his contract of employment and violating all his instructions and thereby get drowned on a navigable stream where he was not employed, directed or required to be, and then hold his employer liable for his injury or death.

IV

The petition for writ should also be denied because:

No administrator of the decedent has ever been appointed, and the claim was filed solely by and in the name of Jessie Booker Armistead, his widow, and not by and in the name of the "legal representative" of the decedent as is required by section 5 of the L. S.

& H. W. Comp. Act,—and the proceedings, finding and award of the Deputy Commissioner and the judgment of the District Court and the petition for writ of certiorari by and in the name of the "Deputy Commissioner on his behalf" are void for want of jurisdiction.

Section 5 of the Act creates the "exclusive liability" of the employer, and gives or confers the "right or cause of action" **solely** on the "legal representative"—personal representative—of the deceased employee in admiralty whose death resulted from an injury growing "out of and in the course of his employment in maritime."

If Congress had intended to give the "right or cause of action" to begin the proceedings and to make the "election" and to maintain the action to the widow or any of the named beneficiaries, having named them in section 5 of the Act, it would evidently have so stated and would not **expressly** have conferred it **only** on the "legal representative" of the deceased employee "in maritime."

Section 5 and 23 of the Longshoremen's and Harbor Workers' Compensation Act, were so construed by the Circuit Court of Appeals for the District of Columbia in **Chapman, et al,** vs. **Griffiths-Consumers Co.** (1939), 107 Fed. (2d) 263 at 267, where the Court said:

> **"In this case the action was brought by the employers for themselves, the Insurance Company, and the next of kin under the theory that the Act created in them the right to maintain such action. However,** the declaration fails to aver the pertinent fact which brings them within

> the operation of the statute. **It does not allege facts sufficient to create the assignment of the right of the 'legal representative' to recover damages against a third party as set forth in section 933 (c).**"

The Court accordingly dismissed that suit and held that the action was "void" and could not even be amended by substituting the "legal representative" for the employers, Insurance Company, and the next of kin, a demurrer to the action as brought having been sustained in the lower court.

This Court has so construed a similar statute in **Dennison** vs. **Payne,** 293 Fed. 393 (syl. 4) and at pages 341-343; **Troxell's Admr.** vs. **Del. Lac. and Western R. Co.,** 227 U. S. 586, 57 S. Ct. 586, 57 L. Ed. 537, construing the Federal Employers' Liability Act; **Chicago, R. I. and P. R. Co.** vs. **Schendel,** 270 U. S. 611; **Brown** vs. **Fletcher,** 210 U. S. 82, 52, L. Ed. 966, 28 S. Ct. 702; **Ingersoll** vs. **Coran,** 211 U. S. 335, 53 L. Ed. 208, 29 S. Ct. 92; **American Ry. Co.** vs. **Birch,** 244 U. S. 547, 56 L. Ed. 879.

In **Dennison** vs. **Payne,** supra, at 342, this Court said:

> "The Federal Employers' Liability Act gives the right of action in case of death to one employed in interstate commerce to its personal representative."
>
> Id. 343:
>
> "**In American Railroad Co.** v. **Birch,** supra, * * * the action was brought under the Federal Act by the **widow** and **son** of the decedent, they being the sole beneficiaries, **and not by the administrator. The Supreme Court, however, held that the action could not be maintained,** but

could be brought only in the name of the personal representative, and reversed the judgment.

"This Court denied the contention and held that Congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative."

So it is in the instant case. The action could have been brought **only** by and in the name of the "legal representative," as expressly provided in section 5 of the Act.

Further, we have found no authority that authorizes the widow, as she did in the instant case, "to institute the proceeding or assert the right or cause of action in her name, and not in the name of the "legal representative," as is required by section 5 of the Act, nor that authorizes a Deputy Commissioner "on his own behalf," without even the appointment of a "legal representative" under section 5 of the Act to file a petition for writ of certiorari in this Court.

CASES CITED BY PETITIONER

An examination of **Wood Towing Co.** vs. **Parker,** Dep. Comr., 76 Fed. (2d) 770, shows that it is clearly distinguishable from the instant case. There the decedent was "employed to install an engine on a motor boat lying in navigable waters when he met his death." There both his employment and work were maritime and required him to be at the place he was —required him to be on navigable waters. The facts in the instant case are the very reverse of those in

the Wood Towing case. An examination of the other authorities cited in the petition show that they are not similar and are clearly distinguishable from those cited and followed in the Circuit Court of Appeals in the instant case as well as those cited herein.

CONCLUSION

In conclusion it is respectfully submitted that the Circuit Court of Appeals has not rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter; or in conflict with the general law or weight of authority or Federal law; or in conflict with the applicable decisions of this Court, and has not so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

For the foregoing reasons it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

MINITREE JONES FULTON,

Counsel for Respondent,
520 Mutual Building,
Richmond, Virginia.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 20 1941
CHARLES ELMORE CROPLEY
CLERK

In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

PARKER, DEPUTY COMMISSIONER,
ITED STATES EMPLOYEES' COMPEN-
TION COMMISSION, PETITIONER

vs.

OR BOAT SALES, INCORPORATED

IT OF CERTIORARI TO THE UNITED
ES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

INDEX

Page

Statement of the case 5

Decision of Circuit Court of Appeals 6

Questions presented 6

Statement of the Facts 7

Decedent's duties 21

The United States Circuit Court of Appeals reversed the decision of the District Court 23

Argument 27

I. Want of jurisdiction 27

II. Want of jurisdiction 79

Petitioner's contention erroneous as shown by test book writers 45

Other Federal Court decisions 50

The "Maritime But Local" Doctrine 55

Petitioner's factual contentions erroneous, and not supported by substantial evidence 62

Cases cited by Petitioner not in point and distinguishable 69

The petition for Writ of Certiorari 79

Summary of Argument 79

CASES CITED

Page

Alaska Packers Assn. v. *Industrial Accdt. Comm.*, 276 U. S. 467 ..... 24, 49

American Railroad Company vs. *Burch*, 225 U. S. 547, 56 Law Ed. 879, 32 Sup. St. Rep. 603 82

American Railroad Co. vs. *Burch*, 244 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879 83

Brown vs. *Fletcher*, 210 U. S. 82, 52 L. Ed. 966; 28 Sup. Ct. Rep. 702 81

Bull Insular Line, Inc. v. *Scwartz*, 23 S. Ct. 359 (E.D.N.Y.) 72

Chapman, et al, v. *Griffith-Consumers Co.* (1939), 107 Fed. (2d) 263 85

Crowell v. *Benson*, 285 U. S. 22 ..... 36, 38, 51, 52, 59

De Fillippis v. *Falkenberg*, 219 N. Y. 581 68

Denison vs. *Payne*, 293 Fed., Rep. 333 Syl. 4 83

Donald v. *B. & O. R. Co*, 71 F. 2d 810 52

Erdberg v. *United Textile Print Works*, 216 App. Div., 574, 216 N.Y.S. 275 74

Fidelity Cas. Co. vs. *N. Y.* v. *Burris*, 59 Fed. 2d, 1042 54

Grant Smith-Porter Co. v. *Rohde*, (1927) 257 U. S. 469 ..... 49, 52, 56

Hartford Accident & Indemnity Co. v. *Cardillo, et als*, 112 Fed. 2d, No. 1 29

Hartford Accident & Indemnity Co. v. *Hoague*, 1936, 66 App. D. C. 160 30

Hyatt v. *V.N.S. Rubber Reclaiming Co., Inc.*, 230 App. Div. 743, 243 N.Y.S. 474 74

Ingersoll vs. *Coran*, 211 U. S. 335, 53 L. Ed. 208, 29 Sup. Ct. Rep 92 81

Jeffers v. *Foundation Co.*, 2 Cir., 85 F. 2d 24 53

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149 34

Lake Gorian Employers' Liability Assn. Co., Ltd. of London, Eng., v. *Cook* 58

Lawson, Dep. Commr. v. *Maryland Casualty Co.*, 94 Fed. (2d) 193 (CCA 5th) 77

Page

Leonbruno v. *Champlain Silk Mills* (1920), 229 N. Y. 470..... 31

Lizzie M. Troxell, Administratrix vs. *Del., Lakawanna and Western R. Co.*, 227 U. S. 586, 57 L. Ed. 537..... 81

Maryland Casualty v. *Cardillo, Dep. Commr.*, 107 Fed. (2d) 959.. 75

Massman Const. v. *Bassett, Dep. Comm., et al* (1940) 30 Fed. Supp. 813..... 51

Miller's Indemnity Underwriters v. *Braud et al*, 270 U. S. 59.... 53

Ng. Furg H. v. *White*, 259 U. S. 276..... 37

Nogueira v. *N.Y., N.H. and Hartford R. Co.*, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754..... 71

Noqueria v. *N. Y., New Haven and Hartford R. Co.*, 281 U. S. 128 47

Northern Coal & Dock Co. v. *Straud*, 278 U. S. 142..... 65

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287.... 37

Panama Railroad Co. v. *Johnson*, 264 U. S. 375..... 38

Phillips v. *Commissioner*, 283 U. S. 589, 600..... 38

Prendergast v. *New York Telephone Co.*, 262 U. S. 43..... 37

Roach v. *Chapman*, 22 How. 129..... 52

Robertson v. *Cease* (1878) 97 U. S. 646..... 61

South Chicago Co. v. *Bassett*, 309 U. S. 251.....25, 51

South Chicago Co. v. *Bassett, Deputy Commissioner* (1940), 60 S. Ct. 544..... 46

South Chicago Coal & Dock Co. v. *Bassett*, 309 U. S 544..... 70

Southern P. Co. v. *Jansen*, 244 U. S. 205.....34, 57

State Ind. Comm. v. *Nordenholt Corporation*, 259 U. S. 263....47-48

St. John v. *Thompson*, 108 Ver. 66..... 65

Sultan Railway Co. v. *Dept. of Labor and Industries of the State of Wash.*, 277 U. S. 136.....50, 61

Sultan Ry. & Timber Co. v. *Dept. of Labor*, 277 U. S. 135.....25, 53

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420.....38, 39

Terry Co. v. *Beers*..... 68

United States Casualty Co. v. *Taylor*, 4 Cir., 64 F. 2d 521-25.... 53

Page

Washington v. W. C. Dawson & Co., 264 U. S. 219 34

Wheeler Shipyard, Inc. vs. Lowe, Dep. Commr., 13 Fed. Supp. 863, affirmed 78

Wood Towing Corp. vs. Parker, 76 Fed. (2d) 770 (CCA 4th) 76

Longshoremen's and Harbor Worker's Compensation Act, 44 U. S. Statutes:

Sec. 2 (2) 37

Sec. 2 (4) 37, 45, 63

Sec. 3 ..... 24, 36, 40

Sec. 4 (a) 46

Sec. 5 27

Sec. 19 (a) 43

Sec. 21 (b) 5, 43, 44

In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

MOTOR BOAT SALES, INCORPORATED

I.

STATEMENT OF THE CASE

The above captioned suit was instituted by Motor Boat Sales, Incorporated, under Chapter 590, Section 21(b), 44 U. S. Statutes (Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S.

C. A., section 921-b), entitled "AN ACT TO PROVIDE COMPENSATION FOR DISABILITY OR DEATH RESULTING FROM INJURY TO EMPLOYEES IN CERTAIN MARITIME EMPLOYMENTS, AND FOR OTHER PURPOSES," to review, set aside and enjoin an award of compensation made in favor of the "claimant," Jessie B. Armistead, widow of George P. Armistead, Jr., an alleged employee, and her three minor children (one of whom was born before and one four months after their marriage), against E. V. Parker, Deputy Commissioner for the Fifth Compensation Commission (R. 1-6). The United States District Court for the Eastern District of Virginia affirmed the award (R. 58-59).

DECISION OF CIRCUIT COURT OF APPEALS

On appeal the United States Circuit Court of Appeals for the Fourth Circuit in an opinion by Dobie, Circuit Court Judge, reversed the judgment of the District Court and remanded the cause with directions to enter judgment in favor of respondent (Op. R. 69-78; 116 Fed. (2d) 789).

QUESTIONS PRESENTED

The United States Circuit Court of Appeals held that George P. Armistead, Jr., the decedent was employed as a janitor (R. 29-31; 34-35, 39; and the Deputy Commissioner so found R. 7), with certain prescribed duties, and with instructions not to get on a boat or to perform any services on navigable waters or rivers; that his work was local and not concerned with commerce and navigation; that under the Long-

shoremen's and Harbor Workers' Compensation Act, providing that compensation shall be payable only if recovery may not validly be provided by State law; that an injury received in an employment although maritime, pertaining to local matters and having only an incidental relation to navigation and commerce, is subject to application of local Compensation Act and is without the scope of the federal act (116 Fed. 791-792); that Armistead was not employed in maritime employment and had not been ordered, directed or required to get in or work upon boats upon navigable waters, and that no one had ordered or required him to get in the boat at the time of his drowning (792); that he had not been employed in maritime employment and was not within the coverage or ambit of the Longshoremen's and Harbor Workers' Compensation Act (793); that compensation for his injury and death might have been validly provided by State law; that the Deputy Commissioner was without jurisdiction to make the award, and that it was not in accordance with law, and was without substantial evidence to support it (795-796).

STATEMENT OF FACTS

A full statement of the pertinent facts as to decedent's employment, his duties, instructions and orders is here made:

The Motor Boat Sales, Inc., owned and operated a retail store at 3 West Grace Street in the City of Richmond, Virginia, and was engaged in merchandising—selling at its store, among other things, outboard motors, small boats and maritime supplies to cover the boats it handled (R. 21-23).

It did not service or do installation and repair work on boats or motors on boats on navigable waters, the boats it sold to its customers being complete, well equipped and ready to go when sold and delivered. Its employees were not employed to work on navigable waters, and had "no business getting on other people's boats." R. 23.)

George W. Todd, a witness for the claimant (R. 20), testified.

R. 23:

"By the Deputy Commissioner:

Q. You said the Company engaged in dealing in maritime supplies of all kinds ?

A. Yes, sir; to cover the boats we handle.

Q. **That means that you serviced boats?**

A. What do you mean "serviced boats?"

Q. Any kind of equipment they wanted to put on the boat, would you supply it?

A. **No, sir**; we didn't make a specialty of it. I don't know of any instance where we did installation work.

Q. You sell the boats?

A. The boats we sell are ready to go.

Q. **Did you do any repair work after that?**

A. **No, sir; that was for the boat yards.**

Q. How often would your employees go aboard any boat; every day?

A. No, sir; not every day. It was just a rarity that we got on boats. **We haven't got any business getting on other people's boats.**

Id. R. 24-25.

By the Deputy Commissioner:

Q. Mr. Todd, you said you serviced your own boats?

A. If we trade a boat, which we do, and it is brought in by the customer on a trailer, and if anything is needed to be done to it; like painting, we do it.

Q. Did you do any work on the water?

A. No, sir; we are not equipped for it.

Q. Did you repair engines of boats?

A. No, sir; we don't have any equipment for that.

Q. Any boat while in the water, if the ignition went bad, would you send a man?

A. Yes, sir; we have done it. **The man would not go out in the water.**

Welford Earl Lloyd, another witness for the claimant (27 at 28), testified.

By Mr. Parrish, Counsel for claimant:

"Q. You were working there when George Armistead was drowned?

A. Yes, sir.

. . . . . .

Q. You knew George, of course?

A. Yes, sir.

Q. What did he do around there?

A. The first thing he did was clean up the place. Sometime it would take a half day to a day, and he was in the shop cleaning up motors, buffing tanks, and making deliveries.

Q. General handy man?
A. Yes, sir.

. . . . . .

Q. You were in the shop the day he went down the river and was drowned?
A. Yes, sir.
Q. I will ask you if he wasn't sent down by his employer to assist in lifting two motors?
A. Yes, sir."

Randolph Hobbs, called by defendant, testified. R. 34.

"Q. Were you employed by the Motor Boat Sales, Inc., on August 8, 1938, when it was said that George P. Armistead, Jr., got drowned?
A. Yes, sir.

. . . . . .

Q. Was George Armistead employed there at that time?
A. Yes, sir.

. . . . . .

Q. What was George employed as; what was he employed to do up there?
A. George was employed as a porter (35).

. . . . . .

R. 35.
Q. You were there the day that George went down to the James River?
A. Yes, sir.

. . . . . .

R. 36.
Q. What occurred?

A. To the best of my knowledge——

Mr. Parrish. That is vague and indefinite. We want the facts.

The Deputy Commissioner. Whether you remember it?

A. (Continuing) These two gentlemen came by the store with their boat.

Q. What were their names?

A. Mr. Crown and his brother and we had these two motors at the store and it was agreed to let those two motors go down the river. Mr. Lloyd and I talked with Mr. Crown and we decided to let the motors go down the river to be operated on the back of Mr. Crown's boat. George Armistead, at the time, was instructed to go along to help lift these motors from the car to the boat—each of these motors weighed a little better than seventy-five pounds apiece —and to help load them in the car when they got through.

Q. Do what?

A. Load them back in the car when through.

Q. Help load and unload them?

A. Yes, sir.

Q. Did he have any directions to get in the boat to go in the river to do anything?

Mr. Parrish. I object, unless it is shown that this witness instructed George Armistead.

By the Deputy Commissioner:

Q. Did he have authority to give him instructions any other time during his employment?

A. Yes, sir.

Q. You were his immediate superior?

A. Mr. Todd and I and he worked for Mr. Lloyd.

Q. All three of you?

A. Yes, sir. If Mr. Lloyd wanted a motor carried anywhere or if anybody wanted a hand, George helped.

R. 37.

Q. You can state whether he was going down to the river and what he was going for?

A. He was not instructed to enter the boat.

Q. At any time?

A. No, sir.

R. 38.

Q. You didn't tell him what to do that day?

A. Not particularly that day but George was instructed not to get on boats and he was particularly instructed about that, . . .

Q. He would have to get in the boat if his job was to lift it in the boat?

A. Not particularly. The stern was pulled on the shore and the motor was attached to it.

By Mr. Fulton:

Q. You said he was given specific instructions. Did he have any authority or instructions to ride on boats, perform any duties on navigable rivers, or any other kind of rivers?

A. No, sir.

By the Deputy Commissioner:

Q. Did he ever for the benefit of the Company, with your knowledge, act as a watchman for any boats over night?

A. He acted as watchman on a 35-foot craft we sold Mr. Warner Moore and he was paid by Mr. Moore. He was not there at our request, and George stayed in the store and finished his work and was back the next morning.

Q. He wasn't your employee and the other man paid him and directed him what to do?

A. Yes, sir.

By Mr. Fulton:

Q. He never stayed on any boats for you?

A. No, sir.

By the Deputy Commissioner:

Q. You never sent him out on any mission of that kind?

A. To stay on a boat or run it?

Q. Yes, sir?

A. No, sir.

By Mr. Parrish:

. . . . . .

Q. Mr. Hobbs, do you know who told him to go down the river on this occasion?

R. 39.

A. I can't definitely say that I do. I think Mr. Lloyd can.

Q. Generally the purpose was for him to assist in helping to take the motors and putting them in the car from the shop and out of the car on the boat and back of the boat in the car and back to the shop?

A. Yes, sir.

Q. It usually took two men?

A. Yes, sir.

Q. You weren't going to put both motors on at the same time?

A. No, sir.

Q. You were just testing them at the same time?

A. Yes, sir.

By the Deputy Commissioner:

. . . . . .

Q. Didn't George go on other occasions to take a motor and bring it back; how often?

A. No, sir; George was not there in the capacity of a delivery boy. He would put motors in the car and deliver them to different parts of town. I can't recall another instance where George was sent to the river.

W. Earl Lloyd, recalled for defendant (R. 39).

R. 40.

Q. What did you tell George Armistead to do?

A. He was instructed to get the equipment ready for any trip I was going on. George was instructed to help Johnny take it off the trailer and help put it on the boat but he was not instructed to ride on the boat.

Q. That was the instructions?

A. Yes, sir.

Q. And he left the store under those instructions? Had he authority or direction from you while there to go out on the river riding in a boat that was operated in deep water?

A. Not any kind of water. The majority

of times he would leave the store he delivered a motor around town that had been repaired.

By the Deputy Commissioner:

Q. He was instructed to help get the motor out of the trailer to the boat and when through, reverse the procedure?

A. Yes, sir.

. . . . . .

R. 41.

Q. Was that as far as your instructions went; to take the equipment down and after it was tried out bring it back?

A. Yes, sir.

William Crown, another witness for defendant,

. . . . . .

R. 41-42:

Q. Was George Armistead told by you or by Johnny Cooper, the boy that went from the Motor Boat Sales down, to get in your boat and ride, or was he ordered or directed not to?

A. Yes, sir.

Q. Did he have any work to do on the boat?

A. None at all.

Q. You were present when he was told to go down with these motors?

A. Yes, sir.

Q. And you were present when they got down there?

A. Yes, sir.

Q. And you never heard any one tell George to get in the boat and ride?

A. No, sir.

Q. Was it your boat that capsized in the river when George was drowned?

A. Yes, sir.

R. 43.

Q. Were you there when they got there with the motors?

A. I don't know.

Q. But it was approximately the same time?

A. I might have been there first.

Q. Whichever got there first would have to wait?

A. Yes, sir.

Q. And Johnny and George put the motors on?

A. Yes, sir.

. . . . . .

Q. You put the motor on the end?

A. Yes, sir. George had hold of the propeller and Johnny had hold of the motor inside the boat. He had to clamp it on.

Q. And the outside of the boat was standing on land?

A. Yes, sir.

R. 44.

Q. Was George in the boat?

A. He was helping us.

Q. Did he hop in?

A. He got in.

. . . . . .

John Samuel Cooper (R. 44), another witness called by defendant testified:

R. 45.

Q. On that day, August 8th, that Mr. Crown came by, what was George Armistead. the colored boy that was later drowned, what was he going with you down to the river for?

A. To help me.

Q. Do what?

A. Take the motor off the trailer and put it on the boat and take it off when finished.

Q. Did he have any duties in running a motor on out in the water?

A. Not to my knowledge.

Q. Did you instruct him to get in the boat or did he go of his own accord, for a pleasure ride?

A. He went of his own accord.

Q. You were up there when you were told to take the motor down and he went along to help unload the motor from the trailer and attach them to the boat and take them and put them back in the trailer?

A. Yes, sir.

Q. And they were his sole duties?

A. Yes, sir.

Q. And you heard what was said to him?

A. Yes, sir.

Q. You never gave him any and you never heard anybody give him any direction to go on the water?

A. Not to my knowledge.

R. 46.

Q. When these motors were taken off the trailer and each one was attached to the boat, where was the end of the boat?

A. Sitting on the shore, like Mr. Crown said.

Q. Was that true when you took the Johnson motor off the boat and put the other motor on, that the boat was pulled up on the shore and one motor was taken off and the other motor was put on?

A. Just that end was out of the water. The whole boat was not out of the water, just the back end.

. . . . . .

By Mr. Parrish:

Q. You didn't tell George not to get in that boat on either occasion?

A. No, sir.

Q. He had no instructions to operate the boat on the river?

A. No, sir.

R. 47.

. . . . . .

By the Deputy Commissioner:

Q. What was the purpose of the second trip?

A. To try the motor out and see how it operated.

Q. You could handle it all right either by yourself or with somebody else?

A. Yes, sir.

Q. He didn't do anything to assist you?

A. No, sir. He did sit in the front and keep a lookout.

Q. What was the purpose of that?

A. The water was muddy and to see if he saw anything.

Q. Was that necessary or helpful to you?

A. It was helpful.

By Mr. Fulton:

Q. Did you give any orders to sit in front?

A. No, sir.

Q. There was a seat up front and he was sitting there?

A. Yes, sir.

R. 48.

. . . . . .

Q. Did you hook your two batteries up?

A. I believe we did hook them up.

Q. Was it necessary for George to hook them up?

A. I did it myself.

R. 49.

By the Deputy Commissioner:

Q. How often did you go down to work on boats?

A. Not very often. This was the first time I had been down for some time.

Q. Did you go on other trips?

A. No, sir; I had a boat of my own.

Q. Did you go for the Company on similar jobs, to put a motor on a boat or to test it out.

A. Not that I remember.

Q. This was the only time?

A. Yes, sir.

S. King Fulton, another witness for defendant, testified:

. . . . . .

R. 49.

Q. Did you hire this boy, George P. Armistead, Jr., who got drowned on August 8, 1938?

A. I did.

. . . . . .

Q. What were his duties?

A. He was a porter. We had a porter that lived on the premises, but when George took the job he was married and he did not live on the premises. He was a porter and operated under my supervision, and in December, 1937, at which time I went to Washington——

Q. Were his duties ever changed? You were backwards and forwards?

A. No, sir.

Q. What instructions did you give him and other employees generally when they delivered things about going in other people's boats?

A. George was cautioned never to get into a boat and to have nothing to do with a boat or a motor, as explained by Mr. Hobbs (R. ?). The class of boat we sell our customers does not demand a sale technique. I had very rigid rules in regard to handling boats. Prior to November, 1937, I laid down the law very rigidly in regard to that. I think everybody in the store knew my ruling.

R. 50.

Q. What was your ruling; not to go out in rivers or boats for anybody?

A. Yes, sir.

R. 51.

. . . . . .

By the Deputy Commissioner:

Q. Did this man have occasion under your direction to act as watchman?

A. I was here when that specific case came up that they mentioned. I took Mr. Warner Moore and carried him to the Chris-Craft factory and he saw the boats in action and bought one, and I can state definitely that I did not allow him to go on board the boat. George was a fine colored boy.

By Mr. Fulton:

Q. Was he employed to work on a boat?

A. No, sir.

Q. It has been in evidence that he acted as a night watchman.

A. Mr. Warner Moore engaged him.

Q. Who employed him to act as a night watchman?

A. Mr. Warner Moore, Jr. He employed him.

DECEDENT'S DUTIES

When Armistead was employed as janitor and his wages fixed according to his employment, his work and duties were specifically defined:

R. 29.

By Mr. Fulton:

"Q. Mr. Lloyd, you were the mechanic

up there to do the mechanical work on the motors?

A. Yes, sir.

Q. Was George Armistead, the colored boy referred to here, was he a mechanic?

A. No, sir, he wasn't a mechanic.

Q. The work he did on the motor was cleaning up?

A. After it was pulled down.

Q. To clean up the parts and wash them off?

A. Yes, sir; and dry them. I would take them and put them up and he would buff the tank—shine the tank—so it would look nice.

Q. And that was the only kind of work he did on the motor?

A. Except clean. . . .

Q. His duties up there in the store were cleaning up the store and opening up the store in the morning, washing windows, cleaning motors and driving automobiles for making deliveries over town?

A. He had a schedule to go by."

See schedule, defendant's Exhibit No. 1, R. 30-31; also George P. Armistead, Jr.'s, "Social Security Card" signed by him (R. 35), where he stated over his signature that his position was "Porter; rate of pay per week $10.00."

The above is all the evidence as to George P. Armistead, Jr.'s, contract of employment, his work and the orders and directions given him, and it, as well as his own admission in writing in his Social Security Card, show that he was employed solely as

a janitor or porter; that his work and duties were specifically defined; and that he was specifically instructed not to go upon or do any work on navigable rivers or any other kind of rivers, and that he was never employed "in maritime employment in whole or part."

THE UNITED STATES CIRCUIT COURT OF APPEALS REVERSED THE DECISION OF THE DISTRICT COURT

The United States Circuit Court of Appeals for the Fourth Circuit carefully reviewed all the evidence and, in an opinion handed down by Dobie, Circuit Judge, unanimously reversed the decision of the District Court (R. 59-79), and, inter alia, said (R. 71; 116 Fed. (2d) 791):

> "Some questions of administrative procedure under the Act are involved in this appeal. We shall confine ourselves, however, to the discussion of the single question of whether or not Armistead's employment brought him within the ambit of the Act. As to that inquiry, we think that the answer must be in the negative and that, in the light of this answer, the judgment of the District Court must be reversed.'
>
> . . . . . .

Id. R. 72; 116 Fed. (2d) 792:

> "Was Armistead engaged in maritime employment at the time of his death so that a recovery may be had under the Act? Or was

his employment 'not so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law'? **Alaska Packers Assn.** vs. **Industrial Accident Comm.**, *276* U. S. 467, 469, 48 S. Ct. 346, 72 L. Ed. 656.

"We are forced to the conclusion that Armistead's employment at the time of his death was strictly local and thus **was without the scope of the Act.** Though it is by no means conclusive, we think the title of the Act (Longshoremen's and Harbor Workers' Act) is very informative on our problem. Here is a janitor in a city store, who has been forbidden to go out on boats in navigable waters. To call him a harbor worker or a longshoreman would seem to be a misnomer. When he was sent by his employer on the day of his death to the shore of the James River, this, as far as the record discloses, was the only instance when his duties ever brought him into contact with navigable waters."

Id. R. 77; 116 Fed. (2d) 793):

"(5) It should be noted here that compensation is payable under the Act if, for the injury or death, a recovery 'may not validly be provided by State law.' Act, Section 3(a). It is not necessary for the exclusion of the operation of the federal Act that a recovery should be actually available under a state compensa-

tion act. This is clearly brought out by the opinion of Circuit Judge Soper in **United States Casualty Co.** v. **Taylor,** 4 Cir., 64 F. 2d 521, certiorari denied, 290 U. S. 639, 54 S. Ct. 56, 78 L. Ed. 555."

Id. R. . . . . ; 116 Fed. (2d) 795:

"(6, 7) In **South Chicago Coal & Dock Co.** v. **Bassett,** 309 U. S. 251, 260, 60 S. Ct. 544, 549, 84 L. Ed. 732, the Supreme Court took care to point out that the Act was applicable to employees whose service was that of a sort performed by longshoremen and harbor workers. And in **Sultan Ry & Timber Co.** v. **Department of Labor,** 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820, it was stated that the Act was not applicable even if the employee's work had some admiralty feature, provided this work had only incidental relation to navigation, so that the rights and duties of employer and employee could properly be regulated by local or state law, without working material prejudice to the characteristic features of the general maritime law.

"Armistead's case, we think, differs from the cases discussed above by virtue of the fact that in all of these cases the task assigned, and the instructions given to the employee, necessarily involved the presence of the employee on navigable waters. Armistead, however, was a janitor and he had been expressly cautioned by his employers never to go on boats in navigable waters. Any authorization for Armistead's

> going on the ill-fated boat-trip in question, which may be binding upon his employer, can be predicated only upon the theory that Cooper, the mechanic's helper, was a supervisory employee as to Armistead, and that Cooper's negative acquiescence to Armistead's presence in the boat on this trip might bring the making of this trip within the scope of Armistead's employment. Even should this theory be applicable here, we still believe that any admiralty feature of Armistead's employment falls well within the local doctrine, as that doctrine has been expounded and applied by the courts in connection with the Longshoremen's and Harbor Workers' Act. Armistead was not a mechanic; he had no expert knowledge of outboard motors. This record is devoid of any evidence which might show that, when Armistead was sent upon the errand on the day of his death, the officers of the Boat Corporation ever contemplated that he would go out upon the river in the boat owned by the brothers Crown."

PETITION FOR WRIT OF CERTIORARI

was filed by the Solicitor General of the United States by and in the name of and on behalf of E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission.—It was not filed by or in the name of Jessie B. Armistead, widow, the claimant, or the guardian ad litem of her three minor children who were made parties to the suit (R.....), nor by the "legal representative" of George P. Armistead.

Jr., the decedent,—as the Act, Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, requires,—no "legal representative" of George P. Armistead, Jr., having ever been appointed.

"The Circuit Court of Appeals for the Fourth Circuit erred:

1. In undertaking to determine independently of the Deputy Commissioner's findings whether at the time of his death decedent was engaged in maritime employment.

2. In failing to hold that the findings of the Deputy Commissioner that decedent was engaged, at the time of his death, in maritime employment, were supported by substantial evidence and, therefore, conclusive.

3. In holding that decedent's employment, at the time of his death, was rather local than maritime, and that a state compensation could validly provide recovery for his death.

4. In failing to hold that the finding of the Deputy Commissioner that decedent's death arose out of and in the course of his employment was supported by substantial evidence and, therefore, conclusive.

5. In holding that decedent's death did not arise out of and in the course of his employment."

ARGUMENT

I.

WANT OF JURISDICTION

It is urged that the reasons stated in the Petition

for granting the writ (6-11) and in the specification of error (pages 7-8) are untenable.

FIRST. (a) All the evidence showed that George P. Armistead, Jr., for whose death compensation was claimed, was not employed "in maritime employment in whole or part" and was not ordered or required to go upon or do any work on navigable waters, and that he was not an employee within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, and that the Deputy Commissioner was without jurisdiction to entertain the claim or make the award; and

(b) That his death did not arise out of and in the course of his employment or in the performance of any work he had been employed, ordered or required to do (R. 23, 34, 36, 37, 38, 40, 41, 42, 45, 47, 49, 51). To the contrary, it was established that he was not an employee in maritime employment or ordered or required to go upon or do any work on navigable waters, and that he was drowned on the James River while taking a ride "of his own accord" (R. 45), and as the result of his violating his contract of employment and disobeying his instructions not to go or work on navigable waters, and that he was at a place when drowned where he had not been employed, ordered or required to go or be; and

(c) The departure of George P. Armistead, Jr., from his work and his getting into the boat and riding upon the James River were matters personal to him, and not concerned with commerce and navigation.

It was this departure from his employment and his work that created the danger and peril which caused his drowning.

This was decided by the U. S. Ct. of Appeals of the District of Columbia, in **Hartford Accident and Indemnity Co. v. Cardillo, et als,** (No. 7490), 112 Fed. 2d, No. 1 (July 8, 1940, page 11.)

There the claimant, while employed as helper in employer's produce warehouse and engaged in loading vegetables on to the employer's truck, sustained personal injury by a co-worker assaulting him. The deputy commissioner found that "the injury had its origin in the employment and that it arose out of and in the course of said employment."

The plaintiff there contested this finding of the District Court of Appeals on the ground, that the injury was caused by a personal quarrel between two employees which had **no relation to** their work, and therefore that the injury was not compensable.

The Court of Appeals held: (op. 13 pars. 3-5)

> **"That an employee's employment required work had to require him to be at the place of danger and exposes him to the risk or hazard, and that if an injury results therefrom, then the injury 'arises out of and in the course of the employment,' citing Fidelity and Casualty Co. of N. Y. v. Burris, (1932), 61 App. D. C. 228 at 230, 59 Fed. 1042 at 1044."**

. . . . . .

The Court of Appeals, then referring to "the earlier rule requiring special risks, since abandoned," said:

> **"It is now held by the greater weight of authorities that, if an employee in the course of his employment has to pass along the public**

streets and thereby sustains an accident by reason of the risk incident to the street, the accident 'arises out of' as well as 'in the course of his employment'." (There he was employed to work in the street.) The Court continuing said (page 14):

"In other words, work increases the employee's exposure to the risks of the street whenever it requires his presence upon it, whether they are common to him or other users or peculiar to him alone. The street merely replaces the factory as the working environment. It is not the peculiar nature of the environment or the risk, provided it is accidental, but the fact that the work brings the worker within the orbit of whatever danger the environment affords that is important."

"(6) In **Hartford Accident and Indemnity v. Hoague**, 1936, 66 App. D. C. 160, 85 F. 2d 418, these principles were extended to an unexplained attack of a stranger taking place on the employer's premises. . . . It is true that claimant's injury was inflicted by a drunken or crazed stranger and was not such a danger as would ordinarily be apprehended by either the employer or the employee. Nevertheless, it was suffered by the claimant when at his place of duty, when upon the industrial premises of his employer, and while he was engaged at the work for which he was employed." (Citing cases.)

"The opinion relied specifically upon the New Amsterdam decision, it ruling that no more is necessary than that the work subjects

the employee to a peril which comes from the fact that he is required to be in the place where it strikes when it does so."

. . . . . .

"(7) No common denominator for the cases can be found in the nature of the specific act or event which is the immediate cause of the injury. . . . the common element is to be found in a broader and more fundamental principle. It is stated by Cordozo, J., in **Leonbruno** v. **Champlain Silk Mills** (1920), 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522, as follows:

> "'The claimant was injured not merely while he was in a factory, but because he was in a factory in touch with associations and conditions inseparable from factory life.' "'NOT THE PARTICULAR OR PECULIAR CHARACTER OF THE ASSOCIATIONS AND CONDITIONS, BUT THAT THE WORK CREATES AND SURROUNDS THE EMPLOYEE WITH THEM IS THE BASIC THING'." (Caps ours.)

The Court then said:

> "Not that the act is in the line of duty, or forwards the work, or creates special risks, **but that the work brings the employee within its peril makes it, for** purposes of compensation, 'part of the work'."

The Court, on page 16 of its opinion, further said:

> "It is sufficient **that the work brings the claimant within the range of peril by requiring his presence there when it strikes."**

All the evidence in the instant case shows that George P. Armistead, Jr., was not an employee in maritime employment, and that he had no work to perform on boats or navigable waters, and that neither his employment nor the work he was directed to do required him to be on the boat or Old Man River or within the range or orbit of his peril—did not require his presence on the river at the place he was drowned.

It did not place him at the point of danger or surround him with the danger, or place him in the presence of the act or peril which was the cause of his drowning. **The "basic" thing required of the claimant under the Act was to establish by "substantial" evidence that Armistead's contract of employment, job or work required him to be present on the boat and at the place where he was drowned when the boat capsized, that is, made the danger a part of his contract of employment or orders when the boat capsized. The claimant failed to offer any such evidence.**

Under the Longshoremen's and Harbor Workers' Compensation Act **it is not sufficient to sustain the claim unless the contract of employment of the injured employee or the work he was ordered to do required his presence on the boat of Mr. Crown and on the river, or at the place and time the danger struck.** Perils arising from a departure from his contract of

employment and disobedience of his instructions are independent causes, and do **not** "arise out of and in the course of employment," but are causes outside the employee's employment or job hazard.

The risk of George P. Armistead, Jr.'s going upon and taking a boat ride "of his own accord" **was no part of his employment or work.** When he was drowned he was not engaged in doing any work he had been employed, ordered or required to do. He was a **non-maritime employee—not employed, ordered or required to work or be on navigable rivers.**

Second. The Longshoremen's and Harbor Workers' Compensation Act has fundamental limitations:

> (a) It deals **exclusively** with compensation and applies **only** when the accidental injury or death of an employee is **"in maritime"** and "arises out of and in the course of his employment, in whole or part, "while such employee is engaged in performing the work he was employed' and required to do upon navigable waters of the United States, **"if recovery through workmen's compensation proceedings may not be validly provided by State law."**
>
> (b) The Act deals with the **job** hazards of longshoremen and harbor workers employed in maritime and only provides compensation for disability and death **of such class of employees.** It **does not provide compensation** for disability or death resulting from an injury to **non-maritime employees upon navigable waters.**

This is shown (a) by the Committee on the Judiciary of the Senate of the United States, reporting upon

the bill (Senate Report No. 973, 69th Congress, 1st sess., p. 16), now Longshoremen's and Harbor Workers' Compensation Act, where it said:

> "If **longshoremen** could avail themselves of the benefit of state compensation laws, there would be no occasion for this legislation, but, unfortunately, they are excluded from these laws **by reason of the character of their employment**; and they are not only excluded, but **the Supreme Court** has more than once **held that Federal legislation cannot, constitutionally, be enacted that** will apply state laws to this occupation. **Southern P. Co.** v. **Jansen,** 244 U. S. 205, 61 L. Ed. 1086, L. R. A. 1918 C, 451, 37 S. Ct. 524, Annotated Cases 1917 E, 900, 14 N. C. C. A. 597; **Knickerbocker Ice Co.** v. **Stewart,** 253 U. S. 149, 64 L. Ed. 834, 11 A.L.R. 1145, 40 S. Ct. 438, 20 N.C.C.C.A. 635; **Washington** v. **W. C. Dawson & Co.,** 264 U. S. 219, 68 L. Ed. 646, 44 S. Ct. 302, 24 N.C.C.C.A. 253."

The House Committee, in its report (House Rep. No. 1767, 69th Cong. 2d sess., page 20), said:

> "The principle of workmen's compensation has become so firmly **established that simple justice would seem to require that this class of maritime workers should be included in this legislation."**
>
> . . . . . .
>
> "The bill as amended, therefore, will enable Congress to discharge its obligation to **maritime workers** placed under their jurisdic-

> tion by the Constitution of the United States **by providing for them a law** whereby they may receive the benefit of workmen's compensation." . . .

Except as to the District of Columbia, the Longshoremen's and Harbor Workers' Compensation Act provides **no coverage** for work both afloat and ashore in "an amphibious job." It does not apply to **non-maritime employment upon navigable waters,** since injuries occurring in the later status, no doubt "may validly be compensated under a state law."

The Act thus created recognized what the court decisions and to law writers call "The local exception." It only provides compensation where the relation of the employer-employee exists **in maritime employment.** For these classes of maritime employees it provides compensation and **in this sphere is responsive to the concept** of **maritime unity and is limited to the designated class of persons to whom compensation may be awarded by a commissioner.** It **only** conferred jurisdiction upon him as to questions of fact, arising with respect to injuries of employees "within the purview of the Act" and then **only** when the claim is supported by evidence showing it to be within the scope of his authority. An award to an injured **non-maritime employee,** or whose injury did not "arise out of and in the course of his employment," or whose compensation may be provided by state law, even though his injury should occur upon navigable waters, "is not in accordance with law."

Hence the Longshoremen's and Harbor Workers' Compensation Act **does not apply to the non-maritime**

employment of George P. Armistead, Jr., and to his injury at a place where he was not employed or required to be, even though his injury occurred upon navigable water. His employment and work were **non-maritime,** did not require him to be where he was, and where matters purely "local"—not concerned with commerce and navigation.

The Act does not authorize a commissioner to award compensation for injury to an **employee** not **"within the purview of the Act."** Such an award is not final. The mere locality of injury, therefore, is not sufficient to bring a case within the Longshoremen's and Harbor Workers' Compensation Act. Congress designed the Act to cover the "job hazards of maritime employees" while performing their work on navigable waters. The requirement is two-fold: (a) The employment and work must be in maritime, and (b) the injury must occur on navigable waters while the employee is engaged in the work he was employed and required to do.

This is shown by all the decisions of this Court, especially in **Crowell** v. **Benson** (Feb., 1932), 285 U. S. 22, 76 L. Ed. 598, 52 Sup. Ct. Rep. 285, Chief Justice Hughes, delivering the opinion, at page 287, said:

> "(1) First. **The Act has two limitations that are fundamental.** It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States' if recovery 'through Workmen's Compensation proceedings may not validly be provided by State law, and it applies only when the relation of master and servant exists. Sec 3. 'Injury.'

within the statute, 'means accidental injury or death arising out of and in the course of employment,' and the term 'employer' means one 'any of whose employees are employed in maritime employment in whole or part' upon such navigable waters. Sec. 2 (2) (4) 33 USCA, 902 (2, 4)."

"As the Act relates solely to injuries occurring upon the navigable waters of the United States it deals with maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction. (Const. Art 3, sec. 2), citing cases." . . .

"This Court, at p. 271, said:

" 'An award not supported by evidence in the record is not "in accordance with law." '"

Id. 290:

"Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, 40 S. Ct. 527, 528, 64 L. Ed. 908; Ng. Fung Ho. v. White, 259 U. S. 276, 284, 285, 42 S. Ct. 492, 66 L. Ed. 938; Prendergast v. New York Telephone Co., 262 U. S. 43, 50, 43 S. Ct. 466, 67 L. Ed. 853; Tagg Bros. &

> **Moorhead** v. **United States,** 280 U. S. 420, 443, 444, 50 S. Ct. 220, 74 L .Ed. 524; **Phillips** v. **Commissioner,** 283 U. S. 589, 600, 51 S. Ct. 608, 75 L. Ed. 1289. **As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. Panama Railroad Co.** v. **Johnson,** 264 U. S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748."

This Court, in **Crowell** vs. **Benson supra,** page 291, referring to contentions similar to those made in Petitioner's Brief under Specifications of Errors (1) and (2), at page 291, said:

> "(4) Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees **within the purview of the Act,** the findings of the deputy commissioner, supporter by evidence and **within the scope** of his **authority,** is final." . . .

This Court then discussed cases which could be "deemed to relate only to the determination of facts," within the purview of the Act and, in **Crowell** v. **Benson,** at page 292 said:

> "(7) The Congress did not attempt to define questions of law, **and the generality** of the **description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had**

held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or contrary to the indisputable character of the evidence, or where the hearing is inadequate, or unfair, or arbitrary in any respect. Interstate Commerce Commission v. Louisville R. R. Co., supra, at p. 91, 92 of 227 U. S., 33 S. Ct. 185; Tagg Bros. & Moorhead v. United States, supra. . . . "

This Court then discussed cases as to the power or right of administrative agencies to determine the facts "within the purview of the Act" and, at page 292, said:

"(8, 9) The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. . . . "

Id, 293:

"The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, is necessary to its effective enforcement." . . . "thus leaving open for determination the questions of fact as to the circumstances, nature, extent and conse-

quences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the Deputy Commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."

At page 294 this Court then said:

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. **A different question is presented where the determinations of fact are fundamental or jurisdictional, in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.**"

. . . . . .

"**In the present instance, the Congress nas imposed liability without fault only where the**

relation of master and servant exists in maritime employment, and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of this enactment. . . . "

. . . . . .

"In relation to these basis facts, the question is not the ordinary one as to the propriety of the provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power

as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Id. 295.

"And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

"Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. . . . "

Id. 296.

"(11) . . . In the present instance, the

argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. . . . "

Id. 297.

"The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (sec. 19 (a), 33 USCA 919 (a) that he 'shall have full power and authority to hear and determine all questions in respect of such claim.' But 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an 'employee,' as defined in the Act, against his 'employer.' The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the federal court to set aside a compensation order as if it is 'not in accordance with law.' Section 21 (b), 33 USCA sec. 921 (b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment (in mari-

time), the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And to remove the question as to validity, we think that the statute should be so construed. . . .

. . . . . .

"Sec. 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, **but whether he has acted in a case to which the statute is inapplicable.**"

. . . . . .

"We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it. The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases

> which fall within the admiralty and maritime jurisdiction and **where the relation of master and servant in maritime employment exists.** It is in the latter field that the provisions for compensation apply, . . . "
>
> "It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its sphere."

PETITIONER'S CONTENTIONS ERRONEOUS AS SHOWN BY TEXT BOOK WRITERS

This Court, in the above leading case, has answered every contention now urged in the Petition and in the Brief of Petitioner, and has conclusively showed that they are untenable.

On that point this Court in the Crowell case, at 295, inter alia, held:

> " . . . **that as to the jurisdictional fact of employment . . . the court, in determining whether a compensation order is 'in accordance with law,' may determine the fact of the employment which underlies the operation of the statute."**

This disposes of petitioner's contention II made in his brief at page 20.

This Court, also in numerous other cases has held that under Sec. 2 (4), in order to make the "employer" liable for compensation the injured or deceased employee **must be "an employee in maritime employment in whole or part** upon the navigable

waters of the United States"; and that Sec. 4 (a) **only** makes employers liable for compensation to employees "in maritime employment"; and that Sec. 5 makes **that liability** i. e. of maritime employers"—exclusive and in place of all other liability" of such employer to such deceased employee's "legal representative."

In **South Chicago Coal and Dock Co., et al,** vs. **Bassett, Deputy Commissioner** (1940), 60 S. Ct. 544, a case cited in the Petition for Writ of Certiorari at page 7, "as probably in conflict" with the decision of the United States Circuit Court of Appeals in the instant case, this Court also specifically refuted petitioner's contention, and held:

> "(Syl. 1) The general scheme of the Longshoremen's Compensation Act was to provide compensation to **employees engaged in 'maritime employment,'** except as stated in the act, for disability or death resulting from injury occurring upon navigable waters of the United States, where recovery through workmen's compensation proceedings might not validly be provided by state law."
>
> . . . . . .
>
> "(Syl. 8) The purpose of the Longshoremen's Compensation Act was to provide compensation **for a class of employees that worked on vessels in navigable waters,** who although they might be classed as 'seamen', were regarded as 'distinct from members of a crew,' being employees whose service was that of laborers of the sort performed by longshoremen and harbor workers as distinguished from

those employees on the vessel who were naturally and primarily on board to aid in her navigation."

"The question was required to be determined by the actual duties of the workman." (syl. 9.)

Chief Justice Hughes delivered the opinion of this Court in the Bassett case (as he did in **Crowell** vs. **Benson**) and cited **Nogueira** vs. **N. Y., New Haven and Hartford R. Co.**, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754, and in 309 U. S. at 235, where this Court said:

"We had occasion to consider the purpose and scope of the Longshoremen's and Harbor Workers' Compensation Act. Its general scheme **was to provide compensation to employees engaged in maritime employment,** especially as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law."

Id, 256:

"This Court also held **that in the case of a longshoreman who was injured on the land,** although engaged in unloading a vessel, **the local law governed and hence the workmen's compensation law of the state applied. State Industrial Commission** vs. **Nordenholt Cor-**

poration, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013."

So that the decision of this Court in the Bassett case sustains the decision of the Circuit Court of Appeals in the instant case, holding that the Court may determine for itself the jurisdictional question as to whether the deceased was an employee in maritime, and, although maritime, whether the local law governed, and hence held that Armistead's employment was non-maritime and local and that compensation might have been validly provided by state law. 116 U. S. 773 (5).

The above decisions of this Court have refuted Petitioner's contentions made in Petition, pages 6-7, and Petitioner's Brief, pages 7-11; 20-24, and held that Congress has not . . . provided that the determinations by Deputy Commissioners of the "fundamental or jurisdictional" facts as to (a) either the locality of the injury, or (b) the existence of the relation of master and servant in maritime employments "shall be final"; and held that the fact of employment in maritime is an essential condition precedent to the right to make the claim; and that, in the absence of any provision in the Act as to the finality of the determination of the Deputy Commissioner of the jurisdictional fact of employment in maritime, the statute means that the Court, in determining whether a compensation order is in accordance with law, may itself determine whether the fact of employment is in maritime and that fact underlies the operation of the statute.

As to that question, this Court further held:

"And to remove the question as to validity, we think that the statute should be so construed. . . . "

"Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. . . . "

This Court also ruled:

"In **Grant Smith-Porter Co.** v. **Rohde,** (1927) 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321), the proceedings was to recover an award under a Workmen's Compensation Act from a shipbuilder for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette river (a navigable river), **the Court held, the contract for constructing the vessel was non-maritime, and although the uncompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment nor his activities at the time had any direct relation to navigation."**

Also in **Alaska Packers' Association** v. **Industrial Accident Commission,** 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656, a person engaged by a fishing and canning company as a season, also as a fisherman, and then for general work in and about a cannery, was injured after the fishing season was over and while **standing**

upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. It was held, that that injury, even if within admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law, a ruling which would not injure the characteristic features or uniformity of the admiralty law." So it should have been held here.

> Also "In Sultan Railway Co. v. Department of Labor and Industries of the State of Washington, 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820, an award for injuries under the Workmen's Compensation Law of Washington . . . was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms which had been towed on a river to a sawmill and the guiding of the logs to a conveyor extending into the river by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an incidental relation to navigation. The rights and obligations of the employees and their employers could well be regulated by local rules, which would not work material prejudice to the characteristic features of the general maritime law."

OTHER FEDERAL COURT DECISIONS

The Circuit Courts of the United States, in construing the Federal Compensation Act as to the above

fundamental and jurisdictional questions, have followed the above decisions of this Court.

They have held that the Act requires the Court to make an independent examination and determine (1) whether the relation of master and servant exists in maritime, and (2) whether the injury occurred upon the navigable waters of the United States while performing work he had been employed or ordered to do.

In **Massman Const.** v. **Bassett, Dep. Comr., et al** (1940), 30 Fed. Supp. 813, the Circuit Court of Appeals for Circuit said:

> "The main point urged by plaintiff in its effort to set aside the award of the Federal Commission is that the United States Employees' Commission **was lacking in authority to entertain the claim of defendants, because the deceased was not engaged 'in maritime services' at the time of the accident which resulted in his death. . . . citing "Crowell** vs. **Benson,** 285 U. S. 22, 52 S. Ct. 286, 76 L. Ed. 598; **South Chicago Coal and Dock Co.** v. **Bassett,** 7 Cir., 104 F. 2d 522. Such a finding is essential to jurisdiction to make any award under the Act."
>
> . . . . . .
>
> "Section 902 (4): 'The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)'."
>
> . . . . . .
>
> "(2, 3) The Longshoremen's and Harbor

Workers' Compensation Act **was designed to provide for maritime workers a remedy similar to that provided by state compensation laws. Crowell** v. **Benson, supra; Donald** v. **Baltimore & Ohio R. Co.,** 4 Cir., 71 F. 2d 810. . . . "

"(5-7) **A maritime contract is a contract which relates to the actual business of navigation.** A contract for building a ship or supplying material for its construction is not a maritime contract for it does not deal with the use of the vessel upon navigable waters. **Roach** v. **Chapman,** 22 How. 129, 16 L. Ed. 294; 2 C. J. S., Admiralty, page 98, Sec. 38. **Agreements to provide mere facilities for navigation are not maritime.** Hence plaintiff's contracts to build the dam was a matter of local concern and not within the admiralty jurisdiction.

"(8, 9) Maritime service has some direct relation to a vessel employed in trade, commerce, or travel upon navigable waters." . . . "The work of the deceased on the land in a cofferdam was not service performed 'upon navigable waters,' and it was not maritime in its nature because it was the design of the project to provide a nine foot channel as an aid to navigation. The improvement of the channel may aid navigation, so may the building of a ship, but neither is directly a part of any undertaking to carry on trade, commerce, or transportation upon public waters. The Sirius, D. C. 65 F. 226; 38 C. J. 1192.

"In **Grant Smith-Porter Ship Co.** vs. Rohde, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25

A. L. R. 1008, a carpenter employed on a ship nearly completed, launched in navigable water, was not engaged in maritime employment because his service had no direct relation to commerce or navigation.

"In **Miller's Indemnity Underwriters** vs. **Braud et al,** 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, a diver engaged in removing submerged timber from a navigable river to aid navigation was not employed in maritime service.

"In **Sultan Railway & Timber Co.** v. **Department of Labor, etc.,** 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820, it was held that workmen engaged in assembling saw logs in booms for towage elsewhere were not in maritime employment, but in service of local character and concern.

"In **United States Casualty Co.** v. **Taylor,** 4 Cir. 64, F. 2d 521, it was determined that a workman engaged in building of a new ship launched but not completed was not in maritime service and state compensation law applied.

"In **Jeffers** v. **Foundation Co.,** 2 Cir., 85 F. 2d 24, it was held that a diver employed to help in building a pier of a bridge across the Ohio River injured while standing inside a cofferdam was not entitled to recover under the Longshoremen's Act because he was not upon navigable waters at the time of the accident.

"(10) The cases give expression to the doctrine by which the present controversy

must be determined. The conclusion to be drawn is (1) that the deceased at the time of his injury was not employed upon navigable waters; (2) that he was not engaged in maritime employment; (3) and that the Compensation Law of Missouri validly furnished a mode of redress."

. . . . . .

"Concluding as we do that Harold Reid Bolting was not engaged in maritime employment, it follows that the United States Employees' Compensation Commission was without authority to enter the award in question."

In **Fidelity Cas. Co.** vs. **N. Y.** vs. **Burris,** 59 Fed. 2d, 1042 at 1043, the Court said:

"(1) It is first insisted that both the lower court and ourselves are bound by the findings of fact of the deputy commissioner, but it is sufficient to say as to this that we have many times held that, upon a review of the record made before the deputy commissioner, our duty is to determine whether his order was or was not in accordance with law, and this depends upon whether the testimony taken before the deputy commissioner will sustain his finding." . . . "As we view the matter, there is no evidence on which to sustain the deputy commissioner's finding."

So it is in the instant case. Armistead, the decedent, was a "non-maritime employee" and was not an employee in maritime employment and did not

come within the purview of the Act; and there was likewise absolutely no evidence to sustain the Deputy Commissioner's findings and award.

In Robinson on Admiralty, Chap. 3, p. 76, the latest text writer on the subject, the learned author says:

> **"Mere locality,** therefore, is not enough to bring a case under the Longshoremen's and Harbor Workers' Act. Congress has made a statute designed to cover **the job hazards** of **maritime workers** while laboring on the water. **The requirement is that maritime character in the work coincide with locality of the injury."**

At page 93, "Workmen's Compensation Act," he says:

> **"(14) State Compensation Acts may apply to maritime injury if the matter is 'maritime but local'."**

Id. p. 101:

THE 'MARITIME BUT LOCAL' DOCTRINE

> "14. The Supreme Court developed a doctrine that matters 'maritime but local' may be left to the states and by this exception many cases of maritime injury **lex loci** are compensable under state compensation acts. In 'local' matters uniformity is not required.
>
> **"The local aspect of the matter has been**

made to depend on the character of the injured man's work. If the work is maritime, and the locus also maritime, the state act is excluded from operation. For non-maritime workers the state act may apply even though the place of injury is in fact on navigable waters."

"The test for the exclusion of state acts was not whether or not the injury occurred upon the maritime waters. This would be clear-cut cleavage. The Supreme Court, however, now made the simple test of mere 'locality' of no avail."

Id. pp. 103-105:

"The nub of the 'local exception' doctrine, of course, lies in the court's definition of 'local.' 'Local' does not have to do with locality; all the cases are those of an injury which is localized on the waters, not on the land. The definition has become bound up with the character of the man's work. By the mere test of locality the injury is maritime in all the cases. This is the common factor. The character of the work is the variant. If the work is 'maritime' the state compensation acts are excluded; if it is non-maritime, the state compensation act is applicable. The 'local' doctrine was explicitly set forth in Grant Smith-Porter Ship Co. v. Rohde. There the shipbuilder had launched a newly constructed ship, still in an unfinished state, undelivered and uncommissioned. But it was afloat in navigable waters when Rohde, who was at work on it as a car-

penter or joiner in the builders' employ, was hurt. He sued in admiralty, alleging the shipbuilding company's negligence. The employer relied upon the State Compensation Act By its provisions the remedy it gave was exclusive. The court said: 'The contract for constructing the 'Aloha' was non-maritime and although the incompleted structure **was lying in navigable waters,** neither **Rohde's general employment nor his activities had any direct relation to navigation or commerce.** Under such circumstances regulation of the rights, obligations, etc., by a local rule would **not necessarily work material prejudice to** any characteristic feature of the **general maritime law,** or interfere with the proper harmony or uniformity of that law.' Justice McReynolds referred to the Garcia decision and said: 'The **present case is controlled by that case's principal'** and 'this conclusion accords with **Southern Pacific Co.** v. **Jensen.**' Rohde's suit in admiralty failed and he was remitted to his remedy under the state compensation act. The thesis that if injury may be labeled 'local' the state law **is made applicable was thus established. . . . "**

Id. p. 106:

"From the authorities we deduce: . . .

(3) If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of the admiralty unless (a) the contract is of merely 'local concern'; and (b) its perform-

ance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters, when and only when the service is within exceptions (a), (b), and (c) above. **(5) If, however, the injury occurs on navigable waters, but in the performance of a non-maritime contract, it is, at least prima facie, local and within the operation of state laws.** If there are any exceptions to this rule, they are yet to be developed."

Id. pp. 107-108:

"In the **Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England,** v. **Cook,** the Fifth Circuit Court of Appeals had before it the injury of a man employed by the Ford Company primarily as a mechanic assembling automobile parts, which, as they came in on Ford ships, were unloaded by the employees of the assembling plant. Cook, while engaged in unloading, was injured on board one of the ships by what the court called 'pure accident,' so that unless under the State Compensation Act there was no recovery as for a maritime tort. The Circuit Court applied the State Act, saying: **'We think . . . that the matter of**

unloading these ships . . . at rare intervals was 'of mere local concern'."

Id. p. 110: At the end of note 67, it is said:

" . . . The Act does not apply to non-maritime employment upon navigable waters. Injuries occurring in the latter status no doubt may be validly compensated under a State law if it so provides."

Id. pp. 119-120:

"Knudson's Case, Crowell v. Benson, the Supreme Court distinguished 'jurisdictional facts' and excepted them from the administrative finality, otherwise recognized. What has been said thus far relates to the determination of claims . . . within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. 'These fact requirements are thus given equal weight.' Should these conditions not exist, Chief Justice Hughes continued, 'there is no ground for the assertion that the person . . . could constitutionally in the absence of fault on his part be subjected to the liability which the statute creates.' For the application of the Harbor

> Workers' Act the workmen must be injured under the same conditions concerning locality which are required to be found as the basis of admiralty jurisdiction in tort generally."

At page 121, the learned author under the heading, "THE OCCUPATIONS WITHIN THE APPLICATION OF THE HARBOR WORKERS' AND LONGSHOREMEN'S ACT," said:

> "*2. The injuries occurring in the latter status no doubt may be validly compensated under a state law if it so provides."
>
> **"Not only must the locality be settled. The man's occupation at the time of his injury must also be determined."**

And at page 122:

> "The qualification is this: **even though the employee is injured while engaged in work on navigable waters,** his rights are to be determined under the state workmen's compensation act, if the enterprise upon which he is at the time **engaged is a purely local matter and not concerned with commerce or navigation.** . . . "

Od. p. 123:

> **"In re Herbert** Chief Justice Bugg for the Massachusetts Supreme Court held that the Compensation Act of the state was applicable in curious circumstances. Herbert worked on

a scow, owned by the Coleman Disposal Company, and used to ferry garbage to an island two miles away in Boston Harbor. Herbert's job was to **sweep the scow** after its unloading, and he was at work while it tied up at the island when he fell overboard. **After reciting the standard** Supreme Court decisions the court said: **'It seems to us difficult to conceive of anything more local in its general nature. . . . It does not appear that the deceased had any work directly connected with maritime affairs'."**

See also pp. 131-132, 174.

"There is no presumption in favor of jurisdiction. Ex parte Smith, 1876, 94 U. S. 455, 24 L. Ed. 207. It must affirmatively appear. Robertson v. Cease, (1878) 97 U. S. 646, 27 L. Ed. 1057."

"In **Sultan Railway Co. v. Dept. of Labor, etc.,** (cited **supra),** it was held, that, even if the employee's work had any admiralty feature, it had only incidental relation to navigation, and that the rights and obligations of such employee and those of his employer could be regulated by local or State law, without working material prejudice to the characteristic feature of the general maritime law."

PETITIONER'S FACTUAL CONTENTIONS ERRONEOUS, AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

On page 5 of Petitioner's Brief it is stated:

> "So much is undisputed. In addition, there was evidence that on at least one occasion respondent had taken a prospective customer for a boat ride on navigable water for the purpose of interesting him in buying a cruiser (R. 24). There was also testimony that from time to time respondent would send its **mechanic** to repair ignitions or otherwise service customers' boats on navigable water if they 'needed anything,' the mechanic sometimes accompanying the customer on test trips in order to 'adjust the carburetor or anything like that' (R. 24-25, 31-34). The mechanic testified that on the date in question he either told Cooper 'to take George (decedent) or I told George to go and help' (R. 40). Finally, there was evidence that customarily when decedent was sent out from the store he was subject to 'orders' and, **supposedly,** would be subject to the orders of respondent's white employees (R. 29)."

In the instant case there was not only no substantial evidence to support the above contentions, but all the evidence shows that the decedent was not employed in maritime employment and that when his death occurred by drowning he was at a place, namely, on the James River, where he had not been employed, ordered, directed or required to be.

Moreover, the Deputy Commissioner himself found that the decedent's death resulted from drowning in the James River **"while he was employed as a janitor and handyman" (R. 7).** That he was so employed and instructed not to go on or work on navigable or other rivers and went "of his own accord" (R. 45), is shown by all the evidence. See evidence (R. 38; 40-41; 41-42; 45; 46, 47; 49-50, 51).

Decedent's contract of employment, his instructions and the work he was specifically ordered to do on the day he was drowned, were all non-maritime. In these circumstances, even if his injury and death occurred on navigable waters, it is, at least, prima facie local and within the operation of State law—purely a local matter not concerned with commerce or navigation.

The contention that because the respondent was selling marine supplies, small boats and outboard motors at its store, and that **"On occasions"** its employees (mechanics) went aboard vessels of the owners—third parties—and tested out the ignitions on trips on navigable waters, that George P. Armistead, Jr., the janitor, handyman and decedent—was, therefore, an employee in maritime, is a non-sequiter—since all the evidence shows that the decedent was not an employee in maritime employment, was not ordered or required to go upon or do any work on navigable waters, and that neither his employment nor work took or required him to go on navigable waters or to be at the place he was when he was drowned.

The further suggestion that because Sec. 2 (4) of the Act means "an employer any of whose employees are employed in maritime emploment in mari-

time employment upon navigable waters," that this makes the decedent an employee in maritime and that the Deputy Commissioner could look to the employment activities of other employees and not merely to the employment and duties of the decedent, is without substance. This contention impliedly concedes, what all the evidence shows, that the decedent's employment was not in maritime and that he was not a maritime employee.

If, however, Petitioner's construction of the Act be adopted, which we protest, it would render the Act unconstitutional because it would enable a non-maritime employee who violated his contract of employment and his specific instructions and orders, to recover for an injury he sustained simply because some other employee who was not injured may have on **rare** occasions engaged in working on navigable waters, and would enable the decedent, a non-maritime employee, to recover even though his injury or death did not "arise out of and in the course of his employment," and who went of his own accord (R. 45) upon navigable waters where he was not employed, directed or required to go, and even if recovery through workmen's compensation proceedings might validly be provided by State law, and his employment and work were purely of local concern—not concerned with commerce and navigation.

Such "rare" occasions does not show, either as a matter of fact or law, that the "occasional" matter, referred to on page 5 of Petitioner's Brief, made or constituted the other employees in maritime employment, or other than local work.

As was said by Chief Justice Bugg in re. Herbert (1933), 283 Mass. 348, 186 N. E. 544:

> **"It seems to us difficult to conceive of anything more local in its general nature. . . . It does not appear that the deceased had any work directly connected with maritime affairs."**

Also see **St. John** v. **Thompson,** 108 Ver. 66, 182 A. 196.

There St. John was employed to go with his employers to a summer resort on Lake Champlain, where he was to work on land (as was Armistead, the decedent here), and was also to do what was required of him as to a motor boat that was to be operated on the lake (navigable water). The motor boat became disabled on the lake and a row boat was procured and moored to the motor boat. This mooring became unloosed and the row boat drifted away from the motor boat. St. John, in an attempt to retrieve the row boat, was drowned. The (Vermont) Court held that his employment was maritime and that he could not recover under the state law, and, in this connection, said that "since the accident happened on navigable water, the mere fact that the major portion of St. John's employment was upon land was unimportant. . . . But this was only following **Northern Coal and Dock Co.** v. **Straud,** 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232."

The Circuit Court of Appeals in the instant case, 116 Fed. (2) at 793, distinguished that holding and said:

> "This leading case, we think, can easily be distinguished from our case. **An appreciable part of St. John's employment must necessarily have been on navigable waters in the**

> **motor boat.** In the instant case, however, Armistead was hired as a janitor and cautioned never to go on navigable waters."

Armistead's, the decedent's, contract of employment was not only for work to be done by him as a janitor on land but he was specifically instructed never to go on boats or navigable waters, and the orders given him on the day he was drowned showed that his work was to be done on land and did not require him to get in the Crown boat and take a ride on navigable waters. This he did "of his own accord" (R. 45).

Furthermore, the mere fact that some of respondent's other employees may have "occasionally" gone on boats **owned by other people** at their request and even have done the things mentioned, would not make them employees in maritime employment nor make their occasional work "maritime," and the evidence of George W. Todd, a witness called for claimant on this point showed (R. 23):

> "Q. How often would your employees go aboard any boat; every day?
>
> "A. No, sir; not every day. It was just a rarity that we got on boats. **We haven't got any business getting on other people's boats."**

Certainly, the "occasional" work referred to would not make the decedent, George P. Armistead, Jr., or such other employees "employees in maritime employment," even if such other employees did adjust

the carburetor and thinge like that on other people's boats.

Furthermore, the suggestion made in the Brief that, although Armistead went upon Crown's boat "of his own accord" (R. 45) and contrary to his contract of employment and instructions, that his riding in the boat with his face to the front was "helpful" to Cooper, who was driving the Crown boat for him at that time, would not make Armistead, the decedent, an employee in maritime employment, nor make his death which resulted from his riding in the boat of his own accord "arise out of and in the course of his employment."

The further argument made in the Brief (page 26) that,

> "Here the issue correspondingly turns on the facts with respect to decedent's general duties as handyman, the particular instructions he had received, the purpose of his accompanying Cooper on the trip on the river, the service performed by him as a lookout, the relationship between him and Cooper, and Cooper's acquiescence or approval of his presence in the boat made the decedent an employee in maritime,"—

is contrary to the evidence and is without substance.

All the evidence shows that Cooper was not a superior employee of George P. Armistead, Jr., that he had no right or authority to change the decedent's contract of employment, his defined and specific work he was instructed to do; and that Cooper never claimed or attempted to be decedent's superior em-

ployee; he never ordered or directed him to get in the Crown boat or to ride therein (R. 45), or to keep a lookout or perform any work on the water on the trip (R. 41-42; 45-46). The mere negative fact that Cooper did not instruct Armistead, the decedent, not to go upon navigable waters cannot change the character of his contract of employment as a janitor and handyman, or enlarge the character and kind of work he was directed to do on the day he was drowned, or authorize him to violate the specific instructions that he was given when employed "never to go on boats upon navigable waters or any other kind." The uncontradicted evidence shows that neither Cooper nor Crown, the owner of the boat, nor anybody else authorized, ordered or required Armistead to get in the boat and go out in it on the river or to take the trip, or to keep a lookout or to render any service or do any act. Neither Cooper nor Crown had any authority to give such orders or directions and they gave none. (R. 41-42; 45). Also see **De Fillippis** v. **Falkenberg**, 249 N. Y. 581.

In **Ferry Co.** v. **Beers**..... this Court said:

> "So far from the contract being purely maritime and touching rights and duties pertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land," and
>
> "Admiralty jurisdiction in cases of contracts, depends primarily upon the nature of the contract, and **is limited** to contracts, claims and services purely maritime and touch-

ing rights and duties appertaining to commerce and navigation."

All the evidence shows that neither the decedent's contract of employment, specific instructions, orders nor services were maritime. They did not touch the rights and duties appertaining to commerce and navigation.

CASES CITED BY PETITIONER NOT IN POINT AND DISTINGUISHABLE

The basis error of the learned counsel for Petitioner in discussing the case is—

That they fail to distinguish between jurisdictional and administrative findings—fail to recognize that, in order to give a United States Commissioner jurisdiction under the Act to award either compensation or damages to an injured or deceased employee, such employee must be "an employee in maritime employment"—fall within the purview or coverage of the Act,—and the award must be in accordance with law, and that the injury or death must result while engaged in maritime employment on navigable waters—where he was required to be.

This fundamental error runs through the argument in Petitioner's Petition and Brief in discussing the cases. In doing so, they either disagree with this Court, or overlook or disregard the decisions of this Court, especially in **Crowell** v. **Benson**, cited **supra**, where this Court said (297 S. Ct.):

> "In the absence of any provision as to the finality of the determination by the Deputy

> Commissioner of the jurisdictional fact of employment, the statute is open to the construction that the Court in determining whether a compensation order is in accordance with law, may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think the statute should be so construed."

And at page 292:

> "The Act is made to facilitate the exercise by the Court of its jurisdiction to deny effect to any administrative finding without evidence, or, contrary to the indisputable character of the evidence . . . or arbitrary in any respect."
> Id. 294-296.

The claim of the injured or deceased employee must not only be of or for an employee in maritime employment and fall within the purview of the Act and be according to law, but the administrative findings committed to the determination of a Deputy Commissioner must also be supported by **substantial** evidence,—not without evidence or against it.

The case of **South Chicago Coal & Dock Co.** v. **Bassett,** 309 U. S. 544, et seq., referred to in the Petition at page 7 as "in probable conflict with the decision of the Court below" does not support the suggestion.

That case was decided by Chief Justice Hughes as was the case of **Crowell** v. **Benson, supra,** and at page 547 this Court held:

> "(1, 2) In **Nogueira** v. **N. Y., N. H. and Hartford R. Co.**, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754, we had occasion to consider the purpose and scope of the Longshoremen't and Harbor Workers' Compensation Act. Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters . . . , where recovery through workmen's compensation proceedings might not validly be provided by State law. . . . "

But the Court also held that in the case of a **"longshoreman** who was injured on the land, although engaged in unloading a vessel, the local law governed and hence the workmen's compensation law of the State applied."

> "And in thus providing Congress had constitutional authority to define the classes of such employees who should receive compensation and to exclude those described in Section 3, **Nogueira v. N. Y., N. H. and Hartford R. Co., supra."**

In the Bassett case John Schumann, the deceased employee, had been employed in maritime employment and that he was drowned on navigable waters while engaged in doing the work he had been employed and directed to do." The **only question there before the Court** was whether or not he was a "mem-

ber of a crew of a vessel" and fell within the exception mentioned in the Act.

This Court deciding that question, at page 548 said:

> **"So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not "a member of a crew" terns on question of fact, the authority to determine such questions has been confided by Congress to the Deputy Commissioner."**

It was conceded that he was a "maritime employee" and fell "within the purview of the Act," and was serving "as a laborer and as a longshoreman,"—and not as a "member of a crew." So that the Deputy Commissioner was not called upon in that case to decide any of the **jurisdictional** questions mentioned in the quotation **supra,** in the decision of this Court in the Crowell case. The distinction between the two cases is obvious.

In note 3, page 7 of the Petition, counsel for Petitioner argue that the Deputy Commissioner "could give little weight" to the uncontradicted evidence that Armistead, the decedent, "had been instructed not to go on boats in the water (R. 73, 74, 77), and could draw an inference **contrary** to all the uncontradicted evidence and predicate his decision upon such inference, and make a finding without "substantial" evidence.

We respectfully submit that such is not the law. The case of **Bull Insular Line, Inc. v. Scwartz,** 23 S. Ct. 359 (E.D.N.Y.) does not sustain the above contention of Petitioner.

In that case Vascone sustained injury "while employed in maritime employment" to work on board a steam ship on navigable waters, and died as a result of his injury. All the evidence showed that he was employed in maritime employment as a longshoreman and engaged in unloading a cargo from a steam ship, the specific work he had been employed to do. It was contended that his death was not caused by injury sustained "in the course of his employment," on the ground that Vascone's orders forbade him from going on the ship. The evidence on that point showed that at the time he went on the ship "it was raining," and that it was **customary** for dock men (like Vascone) to stand on bags of sawdust or dunnage boards to prevent their feet from getting wet, which were kept sometimes on the dock and sometimes on the ship; and that the hatch covers had been removed, in consequence of which the deceased fell into the hold of the vessel and had died from his injury; that Vascone before his death had said he had gone between the deck to obtain a plank to place under his feet because it was raining; that there were no boards on the dock and he went on to the ship to get some. The Deputy Commissioner found:

> **"I believe that the plaintiff failed wholly to sustain the burden of proof on the question of the existence of a rigid rule, the violation of which would take the offender out of the scope of his employment."**

In that case Vascose was employed "as a longshoreman" to work on the dock and he clearly fell "within the purview of the Act." In the instant case

Armistead was a "janitor" employed to work on land, with instructions not to go on navigable waters, and none of his work or duties required him to get in the Crown boat or go riding on the river.

The instant case, therefore, falls within the case of **Hyatt** v. **U. S. Rubber Reclaiming Co., Inc.**, 230 App. Div. 743, 243 N. Y. S. 474, and of **Erdberg** v. **United Textile Print Works**, 216 App. Div. 574, 216 N. Y. S. 275. There the Court, in the Hyatt case, quoting from the Endberg case, said (page 475):

> "Disobedience of an order may do no more than to establish a fault on the part of an injured employee. In that case the employee would not lose his right to compensation. The order, however, may go further. It may so restrict the activities of the employee that its violation would place him outside of the sphere of his employment, in which case compensation would not be payable. The employee 'is beyond the sphere of his employment if he is injured in the course of doing the thing forbidden.'
>
> "The order or rule of the employer restricted the activity of the claimant; it excluded him from working on a machine in the mechanical department. When injured he was not doing that for which he was employed. He was performing an act not contemplated by his employer under the rule which he says had been promulgated and of which he was informed. When doing the thing forbidden, he was outside of his employment."

The case of **Maryland Casualty** v. **Cardillo, Dep. Commr.**, 107 Fed. (2d) 959, cited by Petitioner, is also not controlling in the instant case.

There the decedent, Najjum, was employed to collect insurance premiums. It was his duty to turn in his accounts in the evening. At the end of the day before he turned in his accounts and while on his way to do so, he was picked up by an automobile party and attacked and robbed, and died as a result of his injuries. Suit was brought against the Insurance Company for compensation. The Deputy Commissioner found that the criminal risk or hazard to which Najjum was subjected was "peculiar to and increased by his employment as an insurance collector, and that the assault and robbery were because of his employment and that his injury and death, therefore, arose out of and while he was in the course of his employment."

In that case Najjum's employment and duties exposed him to the risk, caused him to be attacked, robbed and injured. In the instant case Armistead's employment did not require him to get in the Crown boat and take a ride on navigable waters. He was not only not employed to do this but he was expressly instructed not to get in boats or go upon navigable waters. The danger that resulted in his drowning was caused solely by his act and not by his employment, and in disregard of his contract of employment, positive instructions and the orders given him.

As was said in the Hyatt case **supra**, Armistead's violation of his contract of employment and his specific orders "placed him outside of the sphere of his employment, in which case compensation would not

be payable" . . . . They excluded him from working on navigable waters. When the boat capsized and he drowned, he was not doing or performing any work he had been employed, ordered or required to do, and this wrongful act on his part was not contemplated by his employer or required by his employment and was wholly without the fault of his employer, who is now sought to be unjustly and inequitably mulcted in damages for the death of a nonmaritime employee whose injury and death resulted from his own wrong and in violation of his employment and instructions.

The other cases cited in the Petition and in the Brief of Petitioner are clearly distinguishable from the instant case on similar grounds to those above, as an examination of them clearly shows.

In **Wood Towing Corp.** vs. **Parker,** 76 Fed. (2d) 770 (CCA 4th), the corporation was engaged in operating tugs, barges, etc., in the harbor of Norfolk, and incident thereto conducted a small repair shop or yard in that city. The deceased Trollinger, the employee, was hired as a carpenter and general utility man at the shipyard, and, acting under orders of the Superintendent, was assisting in the installation of a new engine on a motor boat moored in the harbor a few feet from the dock when drowned. When last seen alive he was on the boat in the cockpit of the boat. He was employed in maritime employment. The locus of his injury, contract of employment and the work he was required to do and was performing, were all in maritime.

The Court, at page 772, said:

"Of course, the mere fact that the accident

occurred over water, and that the man's body was found in the water, is not sufficient to confer **jurisdiction** upon the United States Commissioner but the ultimate facts on which his **jurisdiction** are based must be proved; otherwise, the Act is **inapplicable. Of course, if the Federal Act is inapplicable, the Commissioner would be without jurisdiction and his award would be subjected to injunction by a Federal District Court."**

In **Lawson, Dep. Comr. v. Maryland Casualty Co.,** 94 Fed. (2d) 193 (CCA 5th), Rolle, the employee, was employed as a longshoreman and harbor worker and was put into a boat belonging to the dredge company to do the work desired and he was working in that boat on navigable waters under the direct direction of his superior. The locus of the injury, contract of employment, and work he was required to do and was performing, were all in maritime. The Court held:

"Syl. 1. A row boat less than sixteen (16) feet long, propelled by one oar at its stern is **not** a 'vessel,' having a crew within the Longshoremen's and Harbor Workers' Compensation Act.

"A person engaged in dynamiting bottom of channel entering Miami Harbor when he was killed, was not **'a member of the crew of any vessel'** within the Longshoremen's and Harbor Workers' Compensation Act, hence his death was compensable under the Act."

In **Wheeler Shipyard, Inc.**, vs. **Lowe, Dep. Comnr.**, 13 Fed. Supp. 863, affirmed 82 Fed. (2d.) 1022 (CCA, 2d), Thomas Murphy was employed as a painter to paint boats in the water and in the yard. On the day of his injury and death he was instructed to take a motor boat to a customer at Rockaway, L. I., and assist him to tow back to the employer's yard two other motor boats. The two boats to be picked up were made fast by lines to the Sound Wave, and the journey begun, the waters being traversed were all navigable. While the boats were in the Atlantic Ocean a storm arose and one of the boats broke loose, and **Harmitz** called upon upon the deceased to take the wheel of the Sound Wave. Harmitz was washed overboard. Later he discovered that Thomas Murphy had disappeared. His body was recovered and it was established that he had died from drowning. The Court held he was both employed and engaged in maritime employment on navigable water.

The Court of Appeals affirmed the award, held that it was the Court's function to determine whether the Deputy Commissioner acted in accordance with law.

II.

WANT OF JURISDICTION

PROCEEDINGS NOT BEGUN OR PROSECUTED BY PARTY HAVING A CAUSE OF ACTION OR LAWFUL RIGHT —AND VOID

THE PETITION FOR WRIT OF CERTIORARI

was filed by the Solicitor General of the United States by and in the name of and on behalf of E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission.—It was not filed by or in the name of Jessie B. Armistead, widow, the claimant, for herself and three minor children who were made parties to the suit; by Guardian ad Litem; nor by the "legal representative" of the decedent,—as the Act, Section 5, requires,—no "legal representative" of George P. Armistead, Jr., having ever been appointed.

SUMMARY OF ARGUMENT

The right to file claim statutory. It must be filed by deceased employee's "legal representative" (Sec. 5 L. S. & H. W. Comp. Act). Sec. 12 refers to notice of injury or death. Sec. 13 to time for filing claims by injured, or in case of his death by his "legal representative." The objection here is to failure of "legal representative" to file claim at all. The proceeding is not brought by party having any legal right. Want of jurisdiction in Deputy Commissioner to make

award and District Court to enter judgment approving it and in Deputy Commissioner to file Petition for Writ of Certiorari.

First. The objection here is **not** for failure to file the claim within the prescribed period, **but it is that no claim at all had ever been filed by the "legal representative,"** and that Jessie Booker Armistead, who filed the claim on behalf of herself and infant children of the deceased, has no standing in such case and no authority to "elect to claim compensation or to file the claim or to maintain an action . . . for damages on account of such death." Such claim, under Section 5 of the Act, **must be filed by the deceased employee's "legal representative,"** and, no such claim having been filed at all by the legal representative, the award of the Deputy Commissioner, Jessie Booker Armistead, etc., and the judgment of the District Court affirming it are void for want of jurisdiction.

Second. The Act itself creates the Federal jurisdiction as to Workmen's compensation. The right to **elect** as to whether suit shall be brought for compensation or for damages and the right to file the claim for compensation are solely vested by the statute in the **"legal representative" of the deceased employee. The question presented here is as to the jurisdiction.**

Montgomery's Manual of Federal Jurisdiction and Procedure, 3rd Ed., Page 73, Sec. 92, discussing U.S. C.A., Title 28, Sec. 80 (Jud. Code 37), relating as to whether a dispute or controversy **is properly within the jurisdiction of the Court,** at page 73, Sec. 92, citing numerous cases, says:

> . . . **"As to whether the case is within the scope of its jurisdiction, is a question which the court**

> is bound to examine and determine, although not presented by the parties,—and even where they consent to a determination of the controversy on its merits. 'Consent cannot confer jurisdiction, and want of jurisdiction cannot be waived.' The same obligation rests upon a reviewing court; and on every court; and on every writ of error or appeal, the preliminary inquiry is as to the jurisdiction (1) of the appellate court, and (2) of the court from which the record comes.. And, inasmuch as a federal court is a court of limited jurisdiction, the fact that the case is one of which the court may take cognizance must appear affirmatively from the record,—otherwise a reversal must be ordered.. "Unless the contrary affirmatively appears, a presumption will be indulged that a cause is not within the court's jurisdiction."

Third. The question here presented to the Court was squarely before the Supreme Court of the United States in the case of **Lizzie M. Troxell, Administratrix vs. Del., Lackawanna and Western R. Co.,** *227* U. S. 586, 57 L. Ed. 537, under the Federal Employers' Liability Act, containing a provision like the one here. The Court there, in its opinion, at 57 L. Ed. 591, cited the case of **Brown vs. Fletcher,** 210 U. S. 82, 52 L. Ed. 966; 28 Sup. Ct. Rep. 702, and **Ingersoll** vs. Coran, 211 U. S. 335, 53 L. Ed. 208, 29 Sup. Ct. Rep. 92, and said that the **Circuit Court of Appeals** in the Troxell case, supra, held that, "except in mere form, the actions were for the benefit of the same persons and, therefore, the parties were practically the same; and the omission to sue as administratrix was merely

technical and would have been curable by amendment."

The Supreme Court of the United States then said:

> "This conclusion was reached before this Court announced its decision in **American Railroad Company** vs. **Burch**, 225 U. S. 547, 56 Law Ed. 879, 32 Sup. St. Rep. 603. That action was brought under the Federal Employers' Liability Act by **the widow and son of the decedent**, and not **by the administrator.** The Lower Court held that the requirement of the Act that the suit should be brought in **case of death by the personal representative of the decedent did not prevent a suit in the name of the persons entitled to the benefit of the recovery.** In other words, the Court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries they might maintain the action with the appointment of a personal representative. **This Court denied the contention and held that Congress, doubtless for good reasons, had specifically provided that an act under the Employers' Liability Act could be brought only by the personal representative; and the judgment was reversed without prejudice to the rights of such personal representative."**

So it is in the instant case. Congress, doubtless for good reasons, specifically provided that an action or claim under the Longshoremen's and Harbor

Workers' Compensation Act can be brought only "by the personal representative" of the deceased employee to recover compensation under the Act.

In **Dennison vs. Payne**, 293 Fed. Rep. 333, Syl. 4 and at page 341, the Circuit Court of Appeals for the Second Circuit, said:

> "And the law is equally well settled that, if a court, officer or board has acted without authority in the premises, its decision is not merely voidable but void, and affords no protection to those claiming under it." * * *

At bottom of page 342, the Circuit Court of Appeals further said:

> "The Federal Employers' Liability Act gives the right of action in case of the death of one employed in Interstate Commerce 'to his or her personal representative,'" * * *

Id. page 343. The Court said:

> "In American Railroad Co. vs. Burch, 244 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, the action was brought under the Federal Act by the widow and son of the decedent, they being the sole beneficiaries, and not by the administrator. The Supreme Court, however, held that the action could not be maintained, but could be brought only in the name of the personal representative, and reversed the judgment without prejudice to the personal representative."

The Court then cited the Troxell case supra, where the action was instituted under the law of Pennsylvania, but in a Federal Court, to recover for the alleged wrongful death of the decedent by the widow for the benefit of herself and children. **That action she lost.** Troxell's administratrix then instituted suit in the same Federal Court under the Federal Employers' Liability Act. The administratrix in that action recovered, and the Court sustained the judgment.

All the rights and liabilities of the employer and employee "in maritime judgments" are created and arise under and from the Longshoremen's and Harbor Workers' Act. The right of action created therein is given **only** to the "legal representative" of the deceased employee employed in maritime employment, whose death occurred upon navigable waters and "arose out of and in the course of his employment."

The legal representative by the statute is given an election to determine whether he will sue for compensation or for damages, and then to institute a claim for compensation or action for damages whichever he may elect.

No such right is conferred upon the widow and children of the deceased employee, or his other relatives. The claim must be filed and the proceedings instituted by the legal representative. **This is the mandatory provision of the statute.**. If no such action is brought by him, but a claim and proceedings are filed, as here, by the widow without lawful right or authority to do so, then the Deputy Commissioner has no jurisdiction to entertain such claim and his award and the judgment of the District Court ap-

proving the same are void. This is the plain meaning and common sense of the statute, and the District Court had no authority to infringe this provision of the statute.

This Act was construed in **Chapman, et al, v. Griffith-Consumers Co.** (1939), 107 Fed. (2d) 263. There the Court, at page 267, said:

> **"In this case the action was brought by the employers for themselves, the Insurance Company and the next of kin, under the theory that the Act created in them the right to maintain such action."**

The Court held that the Act did **not** create in them a cause of action or the right to make the "election" and file the claim or institute the proceedings to recover "compensation or damages," and that the cause of action was created by the statute and vested **solely** in the "legal representative."

Here the claim is not with respect to the property of the deceased. The claim is created by the statute and is for "compensation or damages" and "such claim" means a claim asserted by the party given the cause of action or the right to make the election and institute and prosecute the claim—not by a person who has no **lawful** right to do so.

Fourth. Moreover, the Deputy Commissioner, who is given jurisdiction to determine "administrative questions" under or within "the purview (and thus at the expense of the Government and the clogging of this court's dockets) of the Act, is not given the right to file a petition for writ of certiorari or to become a litigant and convert himself into a litigant

instead of an "administrative finding body." He has no power or authority under law to become the litigant. He has no interest in the litigation, and the Act does not confer authority upon him to file petition for writ of certiorari. Neither the claim for compensation or damages is for his benefit.

Jessie B. Armistead, the widow, who filed the claim for herself and infant children, was a party to the suit as were her children who were made parties by guardian ad litem: They never filed the petition for writ of certiorari to this Court, nor did the Deputy Commissioner apply for the petition for writ of certiorari in their names but in the name of the Solicitor General of the United States for and on behalf of the Deputy Commissioner.

We find no warrant or authority of law for such action on the Deputy Commissioner's part, and the petition for writ of certiorari should be dismissed.

In conclusion and for the foregoing reasons and to the end that the law may be observed and justice be done, it is urged that this Court should affirm the decision of the United States Circuit Court of Appeals and dismiss the petition for writ of certiorari.

MINITREE JONES FULTON,
Solicitor for Motor Boat Sales, Inc.,
1128 Mutual Building,
Richmond, Virginia.

In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

vs.

MOTOR BOAT SALES, INCORPORATED

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE HOLLAND CO., PRINTERS, STAUNTON, VA.

INDEX

PETITION

Request for rehearing, reconsidering, and reversal of opinion and decision 5

Reasons for request 6–9

Statement of facts 9–15

Prayer for relief 16

Verification of petitioner 16–17

Certificate of counsel 17

SUBJECT INDEX TO BRIEF

DEPUTY COMMISSIONER WITHOUT JURISDICTION TO ENTERTAIN CLAIM 19–23

Armistead a non-maritime employee did not fall within coverage of the Act. Award of Deputy Commissioner not supported by evidence, and reviewable—Act made to facilitate exercise of Court's jurisdiction to deny effect to administrative findings without evidence or contrary to the character of the evidence or arbitrary—Court to determine jurisdictional facts as to whether deceased was employed in maritime employment and award is in accordance with law—Circuit Court of Appeals under no obligation to give weight to Deputy Commissioner's findings or proceedings pending the determination of that question —Evidence showed that Armistead, decedent, was a non-maritime employee and his death did not "arise out of and in the course of employment in maritime" —Occasional work by other employees did not make either them or Armistead an employee in maritime and this even if other employees doing occasional

work may have been, which is denied.—Armistead was not employed, directed, requested or required to work on boats or navigable waters but instructed never to do so—His work not concerned with commerce or navigation but he was a janitor, a non-maritime employee—His work was purely of a local character—Cooper not a superior employee of Armistead, and never acted or attempted to act as his superior employee—And gave him no orders to get in the Crown boat or go out on the navigable river.

WORKMEN'S COMPENSATION COULD HAVE BEEN VALIDLY PROVIDED BY STATE LAW 24–55

COMPENSATION ACT AS CONSTRUED BY THE DEPUTY COMMISSIONER AND THIS COURT UNCONSTITUTIONAL 55

RIGHT TO FILE CLAIM STATUTORY—
Must be filed by deceased employee's "legal representative" (sec. 5 of the Act)—Sec. 12 of Act refers to notice of injury or death which may be given by any interested party—Sec. 13 refers to time for filing claim by an injured employee himself, or in case of his death by his "legal representative"—Objection here is to failure of "legal representative" to file claim *at all* for compensation—Claim made by widow, a party not having legal right to file claim or institute the proceeding—Want of jurisdiction in Deputy Commissioner to entertain her claim or make the award 55–63

Cases cited in opinion of this Court not in point 64–69

Conclusion 69–70

Addenda 71–76

LIST OF CASES CITED

Alaska Packers' Association v. Industrial Accident Commission, 276 U. S. 467 ..... 46, 68
Alaska Packers' Assn. v. *Marshall*, 95 Fed. (2d) 276 54
Am. R. Co. v. *Burch*, 225 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. Rep. 603 ..... 58, 59
Baisley Iron Works v. *Span*, 281 U. S. 222 ..... 67, 68
Chapman v. *Griffith Consumers' Co.* (1939) Fed. (2d) 263 .. 63
Crowell v. *Benson*, 285 U. S. 22 ..... 34, 44
Danks v. *Gordon*, 277 Fed. 821 62
Dennison v. *Payne*, 293 Fed. 333 59
Erdberg v. *United Textile Works*, 216 App. Div. 574, 216 N. Y. S. 275 21
Fid. Cas. Co. of N. Y. v. *Burris*, 59 Fed. 1042 22
Grant Smith-Porter Co. v. *Rohde*, (1927) 257 U. S. 469 ..... 46, 52, 68
Hartford Acc. & Ind. Co. v. *Cardillo*, 112 Fed (2d) 11 22
Highway Const. Co. v. *McClelland*, 14 Fed. (2d) 406 62
Hyatt v. *U. S. Rubber Reclaiming Co., Inc.*, 230 App. Div. 743, 243 N. Y. S. 474 21
Interstate Commerce v. *Louisville R. R. Co.*, 227 U. S. 88 38
Jeffers v. *Foundation Co.* (1936) 85 F. (2d) 24 54
King Iron Bridge Co. v. *Otoe County* (1887) 120 U. S. 225 .. 61
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149 ..... 30, 67
Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England v. *Cook* 43, 50, 66
Leon Bruno v. *Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522 22
McLaughlin v. *Western Union Tel. Co.*, Fed. (2d) 177, 179 .. 61
Miller's Indemnity Underwriters v. *Brand*, 270 U. S. 59 ... 53, 68
New Amsterdam Casualty Co. v. *McManigal*, 1937, 87 Fed. (2d) 332 53
New England Nat. Bank v. *Calhoun*, 9 Fed. (2d) 272 61
New York Life Ins. Co. v. *Johnson*, 255 Fed. 958 61
N. Y. Central R. R. Co., v. *Winfield*, 244 U. S. 147 53
Noguira v. *N. Y., New Haven & Hart. Co.*, 281, U. S. 138 ... 69
Northern Coal Co. v. *Straud*, 278 U. S. 142 65

O'Neill v. *Co-operative League of America*, 278 Fed. 737 62
Perez v. *Canadian Land & Fur. Co.*, 14 Fed. (2d) 181 61
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109 68
Robertson v. *Cease*, 1878, 97 U. S. 646 46
Rosenberg v. *Shuler*, 289 Fed. 820, 821 62
Rosengrant v. *Harvard*, 273 U. S. 664 67
South Chicago Coal & Dock Co., et al., v. *Bassett* 47
Southern P. Co. v. *Jansen*, 244 U. S. 205 ..... 30, 42, 64
State Ind. Comm. of the State of New York v. *Nordenholt Corp.*, 259 U. S. 263 51
Sultan Railway & Timber Co. v. *Department of Labor and Industries of the State of Washington*, 277 U. S. 135 ..... 47, 48, 68
Tagg Bros. and Morehead v. *U. S.*, 280 U. S. 420 38
U. S. Casualty Co. v. *Taylor*, 1933, 44 Fed. (2d), 521 54
Vochl v. *Indemnity Insurance Co.*, 288 U. S. 162 64
Washington v. *W. C. Dawson & Co.*, 264 U. S. 219 ..... 31, 67
Western Fuel Company v. *Garcia*, 257 U. S. 233, 242 68

In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

vs.

MOTOR BOAT SALES, INCORPORATED

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays this honorable Court to rehear, reconsider and reverse its opinion and decision handed down herein on December 8, 1941, reversing the unanimous opinion and decision of the Circuit Court of Appeals of the Fifth Circuit of the United States, rendered on the same evidence,

under the same Federal statute and the former decisions of this court, for the following reasons:

I.

After a most careful study of your decision and its far-reaching effect and the inferences drawn therein, it is believed that it is without substantial evidence to support it and is contrary to the uncontradicted testimony and the indisputable character of the evidence, and is probably in conflict with the former decisions of this Court on the same question, construing the same Federal statute, and with the great weight of authority, and the Longshoremen and Harbor Workers' Compensation Act, its intent, purpose and scope, in the following particulars:

1. In holding that the contract of employment entered into between the employer and the employee and the instructions given him by his employer are not fundamental or jurisdictional and that proof of compliance therewith by an employee is not a condition precedent to giving effect to the statutory scheme set out in the Longshoremen's and Harbor Workers' Compensation Act, and that a deputy commissioner of the United States may make an award of "compensation or damages" against an employer predicated upon the employee's violation of his contract of employment and disobedience of his instructions in going on navigable waters, and thereby getting drowned at a place where he was not employed, ordered, requested or required to go or be by his employer or by any one having authority from him to do so.

2. In holding under the Longshoremen's and Harbor Workers' Compensation Act that the question of the jurisdictional fact of whether or not Armistead was employed in "maritime" employment and was at a place where he had not been employed, ordered, requested, directed or required to be when drowned, was for the determination of the deputy commissioner and not of the courts.

3. In holding that the finding of the deputy commissioner that Armistead was an employee in "maritime" employment and was at a place where he had been employed, directed or requested and required to be and was "acting in the course of his employment" were supported by substantial evidence (Op., p. 2, par. 1), and that the fact that he was riding in a boat on a navigable river at the time he was drowned was of itself sufficient to establish his "maritime activities" and support the award. (Op., top p. 3.)

4. In holding that the finding of the deputy commissioner that the claim for compensation fell "within the purview of the Act" and was "in accordance with law."

5. In holding that Armistead's employment was "not local," but was "maritime" and was so "concerned with commerce and navigation" that compensation could not validly be provided by State law. (Op. pp. 2-3, par. (2.)

6. In holding that "What we are called upon to decide is not of constitutional magnitude. For regardless of whether or not the limitation of the power set out in the Jensen case is to be accepted, it is not doubted that Congress could constitutionally have

provided for recovery under a Federal statute in this kind of situation" (Op. p. 4), and, that in the absence of the fundamental and jurisdictional requirement of the Act that the employee's contract of employment must be in "maritime" [Act, sec. 2 (4)] or that the fundamental and jurisdictional requirement do not exist, the employer could nevertheless constitutionally, in the absence of fault on his part, be subjected to the liability which the statute creates.

7. In holding from the evidence and under the Act that the deputy commissioner's finding that Armistead "was acting in the course of his employment was final," and that "The Circuit Court of Appeals should therefore have accepted it as final." (Op. p. 2, par. (1.)

8. In holding from the evidence and under the Act that "Armistead's death was the result of . . . an accident" which occurred at a place on navigable waters where he had not been employed, directed or requested, and required to be by his employer;—and this even though his contract of employment had only incidental relations to commerce and navigation and was of a local character, and "compensation or damages" could have been validly provided by State law without working material injury or prejudice to the characteristic features or uniformity of the admiralty law.

9. In holding that although no "legal representative" of Armistead, the decedent, has ever been appointed," and has never claimed or "elected to claim compensation under the Act, or to maintain an act on at law or in admiralty for damages on account of such injury, resulting in death," as is expressly pro-

vided in Sec. 5 of the Act (Op., pp. 5-6) that this "did not defeat the jurisdiction of the deputy commissioner to hear the claim made by the widow and to award her compensation; and that the claim having been filed by his widow and her capacity to file the claim having not been contested before the deputy commissioner or in the district court, the objection, even if otherwise meritorious, was too late"; and in further holding that the deputy commissioner, a purely administrative agent, who had no interest in this litigation, could, therefore, "in the name of the Attorney-General of the United States," file the petition in this Court for writ of certiorari to the decision of the Circuit Court of Appeals at the expense of the United States, and thus become the active partisan litigant,—was authorized by law and was a proper procedure in such cases and gave this Court the right to grant the writ and entertain it. And this, too, when neither the widow who filed the claim or other party in interest applied for the writ of certiorari or authorized the deputy commissioner to do so.

II.

Your petitioner further represents that the above holdings of this Honorable Court appear to be in conflict with all the uncontradicted evidence, the contract of employment between your petitioner the employer, and Armistead the employee, and with the instructions given him never to go on navigable waters, and with the former decisions of this Honorable Court, and are of transcendant importance to

every employer in the United States of janitors, porters, handy-men, chauffeurs, delivery men, and others of like character and class, who, under their contracts of employment, are "non-maritime" employees like Armistead was here (Op., top of p. 3; finding of Deputy Commissioner, R. 7), and who, as this Court held "was predominantly employed in maritime" (Op., top p. 3) wholly on **land,**— and whose duties were defined (R. 30-31, 35—Armistead's Social Security Card signed by him), and who was "cautioned" and particularly instructed "never to go upon or get in a boat on navigable waters" (Op. p. 2, par. 1), and had no authority from his employer or any other person to go on the river. (R. 38, 40, 45, 49, 51.)

III.

For this Honorable Court to now hold for the first time that such "non-maritime" employees can convert themselves into "maritime" employees and thus make themselves "longshoremen and harbor workers" within the purview of the Act, by going, "of their own accord" (R. 45), upon navigable waters in violation of their contracts of employment and in disobedience of their positive instructions, and thereby get injured or drowned while on navigable waters, will be for this Court to make every employer in the United States of such employees liable in "compensation or damages" under the Act and to extend the Act to all "non-maritime" employees,—a class entirely different from "longshoremen and harbor workers" for which class the Act was solely passed by the Congress of the United States.

IV.

It is further believed and respectfully represented that the Act was never intended by the Congress of the United States to accomplish such a far-reaching effect and to work such injury to all employers of such employees—whether they be porters, handymen or chauffeurs, etc., or to apply the Act **at all** to "non-maritime" employees who, under their contracts of employment, are employed to work wholly on land and "cautioned and instructed never to go on navigable waters" while engaged in doing any work for their employers, as is established by all the uncontradicted evidence (R. 38, 40, 45, 49, 51; Op., p. 2, par. 1.)

V.

The decision of your Honorable Court in your petitioner's case affects such a multitude of employers and employees, it is believed to be of universal interest and importance, and to merit a rehearing and reconsideration by this Honorable Court, not only to protect your petitioner's rights and interests, but to protect the rights and interests of all employers, whose rights to contract and property are seriously involved.

VI.

If the Act as so construed by this Honorable Court without limitation, makes your petitioner and all other employers liable to pay "compensation or

damages" to such "class" of employees as "janitors, chauffeurs, etc."—not employed as "longshoremen and harbor workers"—as it clearly appears to do (Op., top p. 3), then it is respectfully urged that the Act is unconstitutional and deprives your petitioner and all other employers of their inherent right to contract with and to hire their employees as "non-maritime" employees to work wholly on land and of the right to define their duties and to fix or prescribe the place or places where they shall work, and where not to work. If the statute as now so construed by this Court is declared to be the law it will render the Act unconstitutional and result in depriving all such employers of their contract rights and property without due process of law,—and this by conferring upon a single deputy commissioner of the United States the "final determination" of the existence of fact of employment upon which the enforcement of the constitutional rights of such employers depend, and will thereby also oust the constitutional courts of this nation of their jurisdiction. It is only now for the first time that employers are confronted with such a challenge—a challenge by deputy commissioners to ruin employers under the guise of "fact finding" with "finality." This is the first time in our national history when the doctrine that employers have no rights or that those rights may be violated by the holdings of deputy commissioners, the evidence disregarded, and that employers' rights need not be respected by them. (Pet. for writ p. 7, note 3.)

In view of the findings of the deputy commissioner in your petitioner's case disregarding the positive and uncontracted evidence and drawing "inference"

contrary thereto, there is little wonder that there is today so much distrust, dissatisfaction and strife in our national life resulting from awards made by such commissioners who partisanly draw inferences without evidence or contrary to evidence and make findings and reports affecting the contract rights, property and liberty of the citizen. Your petitioner and other employers and the country entertain for this and other constitutionally constituted courts the highest confidence and pursue their business from day to day in their efforts to make a living, pay taxes and support their government in the firm belief that this and the other courts of the United States will safeguard and protect their rights and render just judgments uninfluenced by selfish organizations, or their cohesive force.

VII.

It is further respectively submitted that the conferring upon such administrative agencies the power to find facts, within their proper province and within the purview of the Longshoremen's and Harbor Workers' Compensation Act, "does not require the conclusion by this Court that there is no limitation upon their powers"; nor does it require that it be held that they or the Congress of the United States can completely oust the courts of all determination of jurisdictional facts underlying the statute by vesting the authority to determine them **with finality solely in such deputy commissioner.** For this Court to so hold, as it appears to have done here (Op., p. 2, par. 1), "would be" as said by this Court "to sap the

judicial power of the courts as it exists under the Federal constitution and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do, upon the facts,—since finality as to such facts becomes in effect finality in law. **Crowell** v. **Benson** infra.

VIII.

Your petitioner further represents that the holding of this Honorable Court that the deputy commissioner's finding that Armistead was an employee in "maritime" employment and "was acting in the course of his employment" when drowned was supported by substantial evidence and was "final," and that "The Circuit Court of Appeals should therefore have accepted it as final" (Op., p. 2, par. 1),—simply because Armistead's death occurred on navigable waters (Op., top p. 3), is in direct conflict with the decisions of this Court heretofore rendered on the same question construing the same Federal statute.

In **Crowell** v. **Benson** (1932, 285 U. S. 22, 76 L. Ed. 598, 52 Supreme Court Rep. 285) this Court held at 292:

> The Act is "made to facilitate the exercise by the court of its jurisdiction to deny effect to any administrative finding without evidence, or, contrary to the indisputable character of the evidence . . . , or arbitrary in any respect."

Int. Com. Commn. vs. **Louisville R. R. Co.**, 227 U. S. at 91-92, 33 S. Ct. 185; **Tagg Bros. & Moorehead** vs. U. S., 280 U. S. 420, 50 S. Ct. 220."

Id. 295:

> "In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment the statute is open to the construction that the court in determining whether a compensation is in accordance with law may determine the fact of employment which underlies the operation of the statute. . . . "

That is exactly what the Circuit Court of Appeals did in your petitioner's case, viz., it determined that the award of the deputy commissioner was not supported by "substantial evidence" and was not "in accordance with law" as to the fact of Armistead's employment in "maritime."

Id. 297:

> "As the question is one of **constitutional** authority of the deputy commissioner as an administrative agent the Court is under no obligation to give weight to his proceedings pending the determination of that question."

Your petitioner submits with this petition his brief in support of each of his contentions as to the

holdings made by this Court in his case in further support of his reasons for filing it, where they will be set forth and compared with the holdings in the instant case.

Wherefore, your petitioner prays that his petition for a rehearing of the decision of this Court rendered herein on December 8, 1941, be granted and the case be reheard, reconsidered and reversed, and that the decision of the Circuit Court of Appeals rendered herein, reversing the award of the deputy commissioner and the decision of the District Court, be affirmed.

Respectfully submitted,

MOTOR BOAT SALES, INCORPORATED,
Petitioner.

By S. KING FULTON,
Its President.

MINITREE JONES FULTON,
Counsel for Respondent Petitioner,
1128 Mutual Building,
Richmond, Virginia.

CITY OF RICHMOND,
STATE OF VIRGINIA, to-wit:

S. King Fulton, being first duly sworn, on oath says that he is President of the Petitioner, Motor Boat Sales, Incorporated, whose name is signed to the foregoing petition; that he has read said petition and knows the contents thereof and that the same is

true to his knowledge, except as to matters therein obviously alleged on information and belief, and as to those matters he believes them to be true, and that he has been fully authorized by proper resolution of the Motor Boat Sales, Incorporated, to sign this petition for said corporation and to file the same on its behalf.

Subscribed and sworn to before me this, the 23rd day of December, 1941.

J. LANCASTER WATTS,
Notary Public for City of Richmond, Va.

My commission expires the 1st day of Nov., 1944.

CERTIFICATE OF COUNSEL

The undersigned, Counsel for the Petitioner, Motor Boat Sales, Incorporated, named in the above styled cause of E. V. Parker, Deputy Commissioner U. S. Employees Compensation Commission, Petitioner, v. Motor Boat Sales, Incorporated, October Term 1941, No. 46, hereby certifies that the above and foregoing petition for a rehearing is made, presented and filed in good faith and not for the purpose of delay; and is believed by such counsel to be meritorious.

M. J. FULTON,
Counsel for Petitioner.

December 30, 1941.

In The
Supreme Court of The United States

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

vs.

MOTOR BOAT SALES, INCORPORATED

OCTOBER TERM, 1941

NO. 46

RESPONDENT'S BRIEF IN SUPPORT OF HIS PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

In this brief we will discuss the reasons urged in respondent's petition for granting a rehearing and

re-determining the holdings (1), (2) and (3) of this Court set out in its printed opinion rendered herein on December 8, 1941.

> (1). **"The Circuit Court's conclusion that Armistead was not acting in the course of his employment." . . . "Granting that more than one possible conclusion could have been reached upon the evident, we think it was clearly sufficient to support the Deputy Commissioner's finding that Armistead was acting in the course of his employment."**

FIRST. THIS HOLDING APPEARS TO BE CONTRARY TO BOTH THE EVIDENCE AND LAW.

(A) Does the uncontradicted evidence sustain the above conclusion as the true or just one, which on its face shows that it is based upon an "inference" drawn contrary to the positive evidence quoted therein and that it is not "free from ambiguity and doubt?"

(B) Is the holding in accordance with the Longshoremen's and Harbor Workers' Compensation Act itself [Sec. 2(4)] and the former decisions of this Court, and the great weight of authority?

A.

(1) It is with great deference respectfully asserted that a re-examination and consideration of the testimony by this Court will show that **factually** the

"finding" of the Deputy Commissioner and the holding of this Court that, although Armistead "was predominantly a non-maritime employee" (Op. top p. 3), nevertheless, because he was drowned on navigable waters this "activity" of itself brought the case within the ambit of the Act.

The record will show that the holdings are not only without evidence to support them, but are contrary to the uncontradicted positive testimony, the contract of employment entered into between the employer, Motor Boat Sales, Incorporated, and the employee Armistead, as well as with the positive instructions given him by his employer. (R. 23, 37, 38, 40, 41-42, 45-46, 47, 49-50, appendix).

On this issue the finding of the Deputy Commissioner (R. 7), the holdings of the District Court (R. 55) and of the Circuit Court of Appeals [R. 69, 116 Fed. (2d) 791] that Armistead was employed by the Corporation as "a janitor, porter and handy-man at its store in the City of Richmond," and the holding of this Honorable Court in its opinion (top p. 3, par. (2) that "Armistead, hired primarily as a janitor and porter, **was predominantly a non-maritime employee.**" would seem to clearly establish the fact that Armistead was not "an employee in maritime" and did not fall within the purview, ambit or coverage of the Act [Sec. 2(4)], as held by the C. C. A., R. 69 at 71 to 78, 116 Fed. (2d) 791.

The above not only appears, but **an examination of the record will show** that all of the evidence is to the effect that Armistead had not **only** been employed as a "janitor, porter and 'non-maritime' employee," but that he had also been "cautioned and particularly

instructed" by his employer "never to go on or get in a boat located on navigable or any other kind of waters" (R. 37, 38, 40, 41-42, 45, 46, 47, 49-50, 51. (Appendix)—and that he violated his contract of employment, disobeyed his instructions and **departed from the place** where he was employed to work, and, "of his own accord" (R. 45), got into the boat owned by a third party, a Mr. Crown, and was taking a pleasure ride at the time the boat capsized and he was drowned.

In **Hyatt** v. **U. S. Rubber Reclaiming Co., Inc.**, 230 App. Div. 743, 243 N. Y. S. 474, citing **Erdberg** v. **United Textile Works**, 216 App. Div. 574, 216 N. Y. S. 275, the Court at page 475 said:

> "Disobedience of an order may do no more than to establish a fault on the part of an injured employee. In that case the employee would not lose his right to compensation. The order, however, may go further. It may so restrict the activities of the employee that its violation would place him outside of the sphere of his employment, in which case compensation would not be payable. The employee 'is beyond the sphere of his employment if he is injured in the course of doing the thing forbidden.'
>
> "The order or rule of the employer restricted the activity of the claimant: it excluded him from working on a machine in the mechanical department. When injured he was not doing that for which he was employed. He was performing an act not contemplated by

his employer under the rule which he says had been promulgated and of which he was informed. When doing the thing forbidden, he was outside of his employment."

The above holding is in accord with all the former Federal decisions on this question.

In **Hartford Acc. & Ind. Co.** v. **Cardillo,** 112 Fed. (2d) 11, the District Court of Appeals for the District of Columbia held that where the injury was caused by a personal quarrel between employees which had no relation to their work and that, therefore, the injury was not compensable, and held that an employee's employment and work had to require him to be at the place of danger and expose him to the risk or hazard, and that if it did not the injury would not "arise out of and in the course of the employee's employment." **Fid. Cas. Co. of N. Y.** v. **Burris** (1932), 61 App. D. C. at 230, 59 Fed. 1042 at 1044.

In **Leon Bruno** v. **Champlain Silk Mills,** 229 N. Y. 470, 128 N. E. 711, 13 A.L.R. 522, a leading case, it was held that in order for an employee to recover compensation under compensation acts "the work must bring the claimant within the range of peril by requiring his presence there when it strikes. Not that the act is in the line of duty or furthers the work, or creates special risks, but that the work brings (carries) the employee within its peril makes it, for the purposes of compensation, part of the work."

Armistead was not only not required to get in the Crown boat or go out on the river either by his contract of employment, but the duties he was as-

signed to do were defined, namely, "to help lift the motors from the trailer and carry them to the boat and then to help lift the motors from the boat back into the trailer and carry them to the shop. (Appendix.)

All the evidence shows that neither Armistead's contract of employment, nor the specific duties assigned to him on the day he was drowned, required him to go on the James River. They did not place him at the point of danger, or surround him with the danger, or place him on the Crown boat on the river in the presence of the act of peril which was the cause of his drowning. The "basic" thing required of the claimant under the Act was to establish by evidence introduced that Armistead's contract of employment, the specific duties which he was assigned to do, job or work required him to get into the Crown boat and to take the ride on the river or to be at the place where he was drowned when that boat capsized. **The claimant failed to offer any such evidence.**

Under the Act it is not sufficient to sustain the claim of the claimant **unless** the contract of employment of the injured employee, or the work he was ordered to do, required his presence on the boat of Crown on the river at the place and at the time the boat capsized and the danger struck.

Perils **arising from the departure** by an employee from his contract of employment or disobedience of instructions are independent causes and do not "arise out of and in the course of employment," but are matters outside of the contract of the employee's employment or job hazard.

(2) The Petition for the Writ of Certiorari filed by the Deputy Commissioner (p. 7, note 3) claims that he in making an award could disregard Armistead's contract of employment and the positive instructions given him not to go on navigable waters, and the evidence cited supra shows that he no doubt did disregard them, since all of it was to the effect that Armistead at the time he was drowned on James River in Crown's boat was in a boat and at a place he had not been employed, directed or required to be or go.

The **departure** of George P. Armistead, Jr., from his work and his getting into the boat of Mr. Crown, a third party, and taking a ride of his own accord upon the river was not only "local" and personal matter to him—and not concerned with commerce and navigation—but was a **departure** from his contract of employment and the place he was employed to work, and it was this act of his that created the peril and danger which caused his drowning.

(3) The opinion of this Court (p. 2) shows that its holding "(1)" was based entirely on "inferences." There this Court, after quoting the uncontradicted evidence of the President of the Corporation that "George was cautioned never to go into a boat or to have anything to do with a boat or motors," says:

> "Against whatever inference is to be drawn from the testimony regarding this generally and rather remotely announced rule, **are the 'inferences'** to be drawn from testimony that on the morning of the accident Armistead was sent to the river with **specific** instructions to

help Cooper in placing the outboard motors on the boat; that either Armistead or Cooper was told that Armistead was to go and help Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to keep a lookout for hidden objects in the muddy water; that Cooper regarded Armistead's acting as a lookout as 'helpful'; that employees of respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf. Granting that more than one possible conclusion could have been reached upon the evidence" . . . etc.

An examination of the record shows that the above "inferences" drawn by this Court and upon which it predicates its conclusion are not only in conflict with the above quoted testimony of the President of the Corporation, but shows that those "inferences" are in conflict with all the positive testimony.

On this point, W. Earl Lloyd testified:

"Q. I will ask you if he (Armistead) was not sent down by his employer to assist in lifting two motors?

A. Yes, sir.

Q. Who went with him?

A. Johnny Cooper."

Randolph Hobbs testified:

"George Armistead at the time was instructed to go along to help lift motors from the car to the boat . . . to help load and unload them. (R. 36.) . . .

Q. You can state whether he was to go down to the river and what he was going for?

A. He was not instructed to go in the boat.

Q. At any time?

A. No, sir. (R. 37) . . .

Q. You did not tell him what to do on that day?

A. No, not particularly that day; but George was instructed not to go on boats and he was particularly instructed upon that. . . . that he did not 'have any authority or instructions to ride on navigable rivers or any other kind of rivers.' . . . He did not have any authority or instructions to ride on boats, perform any duties on navigable rivers or any other kind of rivers. (R. 38) . . . The purpose was for him to assist help take the motors and put them in the car from the shop . . . and out of the car on to the boat and back off the boat into the car and back to the shop. . . . and he left the store under those instructions. He had no authority or direction from anyone while there to go out on the river riding on a boat that was operated in deep water—or any kind of water (R. 40)—and he was instructed to help get the motors out of the trailer on to the boat and when done to reverse the pro-

> cedure. That was as far as your instructions went. (R. 41.) That George was not ordered and directed by Crown, the owner of the boat, or by Johnny Cooper to get into the boat and ride—that he had no work to do on the boat. (R. 41-42).

Cooper—whom this Court says in its opinion was the "superior of the two employees," and at least "acquiesced" in Armistead's remaining in the boat to keep a lookout for hidden objects in muddy water"—had no authority over the Crown boat, and no right to order Armistead not to get in Mr. Crown's boat, or to order him to get out. He testified (R. 45) "that he never gave him (Armistead) and never heard anybody else give him any duties to go on or to perform any duties on the water, and that he did not instruct George to get into the boat and that he never gave him and did not hear anybody else give him (George) any duties to go on the water, but that George got on the boat "of his own accord." (R. 45.)

There is no evidence in the record that Armistead was "the superior of the two employees," but, even if he were, the positive evidence of Cooper is that he **never** exercised any superiority over Armistead and that he never instructed, authorized, requested, or required him to get into the boat. There is not a scintilla of evidence that he had any authority to instruct him to get into the boat, or to "acquiesce" in his doing so, and thereby change Armistead's contract of employment and the positive instructions given him "never to go into a boat or have anything

to do with a boat on navigable or any other kind of waters." (Appendix.)

It is further respectfully urged upon this Honorable Court that the fact that George Armistead got into the boat "of his own accord" (R. 45), and that Cooper, who had no authority to instruct him to get on the boat, did not tell him to get off or order him off, does not warrant the "inference" drawn by this Court that Cooper had any authority to "acquiesce" in the unauthorized act of Armistead, and to thereby alter and change his contract of employment and "his positive instructions "never to go on to a boat." Simply because the water was muddy and that Cooper may or may not have regarded that George's sitting in the front of the boat with his face to the front looking out or ahead was helpful, **does not justify the "inference"** drawn by this Court, or its conclusion that, "Granting that more than one possible conclusion could have been reached upon the evidence, . . . we think it was sufficient to support the Deputy Commissioner's finding that Armistead "was acting in the course of his employment."

Especially is this true when all of the evidence shows that Armistead was acting in violation of his contract of employment and his positive instructions "never to go into a boat or to have anything to do with a boat on navigable or any other kind of water." Even if Cooper had told Armistead to get into the boat, or had "acquiesced" in his getting in and riding on the boat, or regarded that fact as helpful to him, it is submitted that such acts were beyond the scope of his authority, and could not make the employer liable for compensation, since the requirement of the

Longshoremen's and Harbor Workers' Act, Sec. 2(4) is that the injured employee **must** have been employed by his employer "in maritime employment" —hired to work on navigable waters or a dry dock— be a "longshoreman or harbor worker"—in order to bring such "employee within the purview of the Act and make the employer liable."

To the contrary, on this issue, all the evidence shows that Armistead was **not** "an employee in maritime"; that he had **no work to perform on boats or navigable waters,** and that neither his employment nor the work he was directed to do **required** him to be on the Crown boat or within the range or orbit of his peril—required his presence on the river or at the place and time he was drowned.—He was a "non-maritime employee" and was not ordered, requested or required to go on navigable waters.

It did not place him at the point of danger or surround him with the danger, or place him in the presence of the act or peril which was the cause of his drowning. The "basic" thing required of the claimant under the Act was to establish by evidence **introduced** that Armistead's contract of employment, job or work required him to go on and be present on the boat and at the place where he was drowned when the boat capsized. The claimant failed to offer such evidence.

(4) The Longshoremen's and Harbor Workers' Compensation Act has fundamental limiations:

> (a) It deals **exclusively** with "compensation or damages" and applies **only** when the accidental injury or death is of an employee

"in maritime" and "arises out of and in the course of his employment, in whole or part, "while such employee is engaged in performing the work he was employed and hired and required to do upon navigable waters of the United States, **"if recovery through workmen's compensation proceedings may not be validly provided by State Law."**

(b) The Act deals with the **job** hazards of "longshoremen and harbor workers" employed "in maritime" and only provides compensation for disability and death **of such class of employees.** It **does not provide compensation** for disability or death resulting from an injury to **"non-maritime employees upon navigable waters."**

This was shown by the report of the Committee on the Judiciary of the Senate of the United States, reporting bill (Senate Report No. 973, 69th Congress, 1st. sess., p. 16), now Longshoremen's and Harbor Workers' Compensation Act, said:

"If **longshoremen** could avail themselves of the benefit of state compensation laws, there would be no occasion for this legislation, but, unfortunately, they are excluded from these laws, **by reason of the character of their employment, . . . "** **Southern P. Co.** v. **Jansen,** 244 U. S. 205, 61 L. Ed. 1086, L. R. A. 1918 C, 37 S. Ct. 524, Annotated Cases 1917 E, 900, 14 N. C. C. A. 597; **Knickerbocker Ice Co.** v. **Stewart,** 253 U. S. 149, 64 L. Ed. 834, 11 A.L.R

1145, 40 S. Ct. 438, 20 N. C. C. C. C. A. 635; **Washington** v. **W. C. Dawson & Co.,** 264 U. S. 219, 68 L. Ed. 646, 44 S. Ct. 302, 24 N. C. C. C. A. 253.

The House Committee Report (House Rep. No. 1767, 69th Cong. 2d sess., page 20), said:

> "The principle of workmen's compensation has become so firmly established that simple justice would seem to require that **this class of maritime workers should be included in this legislation.** . . . "
>
> "The bill . . . will enable Congress to discharge its obligation **'to maritime workers'** placed under their jurisdiction by the Constitution of the United States. . . . "

Except as to the District of Columbia, the Longshoremen's and Harbor Workers' Compensation Act provides **no coverage** for non-maritime employees or for work both afloat and ashore in "an amphibious job." It does **not** apply to **non-maritime employment upon navigable waters,** since injuries occurring in the latter status, no doubt, may be validly compensated under a state law if it so provides.

The Act as thus created recognized what has become known in all the court decisions and to law writers as "The Local Exception Doctrine." It only provides compensation where the relation of the employer-employee exists **in maritime employment.** For this class of maritime employees it provides compen-

sation, and in this sphere is responsive to the concept of **maritime unity and is limited to the designated class of persons to whom compensation may be awarded by a commissioner.** The Act **only** confers jurisdiction upon him as to questions of fact, "arising" with respect to injuries of "maritime" employees "within the purview of the Act," and then **only** when the claim is supported by evidence showing it to be within the scope of his authority. An award to an injured "non-maritime employee," or whose injury did not "arise out of and in the course of his employment," or whose compensation "may be provided by state law, even though his injury should occur upon navigable waters, "is not in accordance with law."

Hence the Longshoremen's and Harbor Workers' Compensation Act does not apply to the "non-maritime" employment of Armistead, and to his injury at a place where he was not employed or required to be, even though his injury occurred upon navigable water. His employment and work were "non-maritime," did not require him to be where he was, and pertained to a matter purely "local"—not concerned with commerce and navigation.

In the instant case it is urged that this learned Court erred in holding:

1. That Armistead was "employed in maritime";
2. That his death "arose out of and in the course of the employment in maritime".
3. That the award of the Deputy Commissioner was final;
4. That no compensation could validly be provided by State law; and
5. That the mere "locality" of his injury on navi-

gable waters was sufficient to bring the case within the coverage of the Act and to give the Deputy Commissioner jurisdiction to make the award. (Op. top p. 3.)

The evidence and law do not support these holdings and they appear to be purely arbitrary.

This learned Court appears to have reached the above conclusions because the Act provides that the term "employer" includes an "employer any of whose employees are employed **in maritime** employment, in whole or part, upon the navigable waters of the United States," and that Armistead could recover, even though he was a non-maritime employee and his death did not arise out of and in the course of his employment, and State acts might validly provide compensation.

If Armistead was a non-maritime employee, or was not engaged in maritime work which required him to be present at the place he was when he was drowned, then he could not recover, even though the employer may have had some other employees employed in maritime,—and the evidence shows the "employer" did not have any employees "employed in maritime employment."

The Act does not authorize a commissioner to award compensation for injury to an employee **not "within the purview of the Act."** Such an award is not final. The mere locality of injury, therefore, is not sufficient to bring a case within the Longshoremen's and Harbor Workers' Compensation Act. Congress designed the Act to cover the "job hazards of maritime employees" while performing their work on navigable waters. The requirement is two-fold:

The employment and work required to be done must be "in maritime," and the injury must occur on navigable waters while the employee is engaged in the work he was hired and required to do.

On these points the Supreme Court of the United States, in **Crowell** v. **Benson** (Feb., 1932), 285 U. S. 22, 76 L. Ed. 598, 52 Sup. Ct. Rep. 285, Chief Justice Hughes, delivering the opinion, at page 287, said:

> "(1) First. The Act has **two limitations** that are **fundamental.** It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States' if recovery 'through Workmen's Compensation proceedings may not validly be provided by State law, and it applies only when the relation of master and servant exists. Sec. 3. 'Injury' within the statute, 'means accidental injury or death arising out of and **in the course of employment,**' and the term 'employer' means one 'any of whose employees are **employed in maritime employment** in whole or part' upon such navigable waters. Sec 2 (2) (4) 33 USCA. 902 (2, 4)."
>
> "As the Act relates **solely** to injuries occurring upon the navigable waters of the United States, it deals **with maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction.** (Const. Art. 3, sec 2), citing cases."

The Supreme Court, at p. 271, said:

> "An award not supported by evidence in the record is not in accordance with law."

In the instant case, the record shows that the claim was "not within the purview of the Act," that the evidence did not support the findings and award of the Deputy Commissioner, and that the claim did not come within the scope of his authority.

This Court (p. 2, par. 1) appears to have reached the above conclusions in part at least on the ground: "that employees of respondent would sometimes make trips in boats for testing purposes in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf." (Op. p. 2, par. 1.)

If Armistead was a "non-maritime employee" as this Court held (top p. 3) he was, or was not required by his employer to be present on the river or at the place he was drowned, then he could not recover even though the employer may have had some other employees employed "in maritime" or "non-maritime" employees who may have made trips in boats on the river,—and the evidence shows that none of its other employees were employees in "maritime employment," or that any of them ever made trips for Motor Boat Sales, Incorporated, in its own boats or "in furtherance of its business."

To the contrary, the evidence shows that the trips referred to in the opinion of this Court were made in other peoples' boats and "in furtherance of their

business" after the boats had been sold and delivered to such third persons. But even if such trips had been made, they would have been of purely a local character and might have been validly provided for by State law, as was Armistead's.

The further "inference" made in the opinion of this Court (p. 2) that "Cooper was a superior employee" to Armistead and that Armistead was sent to the river with instructions "to help Cooper operate the motor" on Mr. Crown's boat, or was subject to the orders of Cooper, is contrary to the evidence. There is no evidence that Cooper was the superior employee, or that Armistead on this or any other occasion was subject to the orders of Cooper either in or outside the store, or that Cooper requested, directed or required Armistead to get into Mr. Crown's boat and go riding on the river. To the contrary all the evidence shows that Armistead was sent to the river with specific instructions; his duties were defined. He was instructed to go on that trip to the bank of the river "to help lift those motors from the trailer to the boat and to help load them from the boat into the car—help load and unload them"—and Cooper specifically testified that he never on this occasion ordered or directed Armistead to get into the boat or gave him any instructions. (Apepndix.)

Todd, the manager of the store, and Lloyd, the mechanic, were George P. Armistead, Jr.'s, superiors, and not Cooper. (Appendix.)

William Crown, when asked if George P. Armistead, Jr., had any work to do on the boat, answered, "None at all," and that he was present when Armistead was told to go down with the motors, present

when he got down there, and that he never heard anyone tell George to get in the boat and ride. (Appendix 19.)

Johnnie Cooper testified:

> "Q. On that day, August 8, 1938, that Mr. Crown came by, what was George Armistead, the colored boy that was later drowned, what was he going with you down to the river for?
>
> "A. Take motor off the trailer and put it on the boat and take it off when finished.
>
> "Q. Did he have any duties in running a motor on out in the water?
>
> "A. Not to my knowledge.
>
> "Q. Did you instruct him to get in the boat or did he go of his own accord for a pleasure ride?
>
> "A. He went of his own accord. (R. 45.)
>
> . . . . . .
>
> "Q. You never gave him and you didn't hear anybody else give him any duties to go on the water?
>
> "A. Not to my knowledge." (Appendix 20-21.)
>
> "Q. He had no instructions to operate the boat on the river?
>
> "A. No, sir."

All the positive and uncontradicted testimony of Cooper is "that he **never** gave Armistead any instructions on that trip, that he never ordered him to get in the boat."

In **Crowell** v. **Benson, supra,** at page 292, it is said:

> "The Act "is made to facilitate the exercise by the Court of its jurisdiction to deny effect to any administrative findings without evidence, or, contrary to the indisputable character of the evidence . . . or arbitrary in any respect. **Interstate Commerce** v. **Louisville** R. **R. Co.,** 227 U. S. 88 at 93, 33 S. Ct. 185, 57 L. Ed. 431; **Tagg Bros. and Morehead** v. **U. S.,** 280 U. S. 420, 443-444, 50 S. Ct. 220, 74 L. Ed. 234."

The Supreme Court, at page 294 of that opinion, further said:

> "The determination of whether the claim was within the purview of the Act **are fundamental and jurisdictional in the sense that their existence is a condition precedent to the operation of the statutory scheme . . . these conditions are indispensable** to the application of the statute not only because the Congress so provided explicitly (Sec. 3), but also turns upon the existence of these conditions."

At page 295, the Supreme Court further said:

> "The Congress has not expressly provided that the **determinations by the Deputy Commissioner of fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be**

final. The finality of such determinations of the Deputy Commissioner is predicated primarily upon the provisions, (Sec. 19 (a), 33 USCA, sec. 919 (a), that he shall have full power and authority to hear and determine all questions in respect of such claim.' But 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an employee, as defined in the Act, against his employer. The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the Federal Court to set aside a compensation order if it is 'not in accordance with law.' Sec. 21 (6) 33 USCA, sec. 921 (b). In the absence of any provision as to the finality of the determination by the Deputy Commissioner of the jurisdictional fact of employment, the statute is open to the construction that the Court, in determining whether a compensation order is in accordance with law, may determine the fact of employment which underlies the operation of the statute."

Id. 297, Sec. 64:

"As the question is one of the constitutional authority of the Deputy Commissioner as an administrative agent, the Court is under no obligation to give weight to his proceedings pending the determination of that question."

In Robinson on Admiralty, Chap. 3, p. 76, the latest text writer on the subject, the learned author says:

> **"Mere locality, therefore, is not enough to bring a case under the Longshoremen's and Harbor Workers' Act. Congress has made a statute designed to cover the job hazards of maritime workers while laboring on the water. The requirement is that maritime character in the work coincide with locality of the injury."**

At page 93, chapter 4, Workmen's Compensation Act, the learned author says:

> "(14) State Compensation Acts may apply to maritume injury if the matter is "maritime but local.'"

Id. p. 101:

> "THE 'MARITIME BUT LOCAL' DOCTRINE
>
> "14. The Supreme Court developed a doctrine that matters 'maritime but local' may be left to the states and by this exception many cases of maritime injury **lex loci** are compensable under state compensation acts. In 'local' matters uniformity is not required.
>
> "**The 'local aspect of the matter has been made to depend on the character of the injured man's work.** If the work is **maritime**, and the

locus also maritime, the state act is excluded from operation. For non-maritime workers the state act may apply even though the place of injury is in fact on navigable waters."

"The test for the exclusion of state acts was not whether or not the injury occurred upon the maritime waters. This would be clear-cut cleavage. The Supreme Court, however, now made the simple test of mere 'locality' of no avail."

Id. pp. 103-105:

"The nub of the 'local exception' doctrine, of course, lies in the court's definition of 'local.' 'Local does not have to do with locality; all the cases are those of an injury which is localized on the waters, not on the land. The definition has become bound up with the character of the man's work. By the mere test of locality the injury is maritime in all the cases. This is the common factor. The character of the work is the variant. If the work is 'maritime' the state compensation acts are excluded; if it is non-maritime, the state compensation act is applicable. The 'local' doctrine was explicitly set forth in Grant Smith-Porter Ship Co. v. Rohde. There the shipbuilder had launched a newly constructed ship, still in an unfinished state, undelivered and uncommissioned. But it was afloat in navigable waters when Rohde, who was at work on it as a carpenter or joiner in the builders' employ, was hurt. He sued in

admiralty, alleging the shipbuilding company's negligence. The employer relied upon the State Compensation Act. The court said: 'The contract for constructing the 'Aloha' was non-maritime and although the incompleted structure **was lying in navigable waters,** neither **Rohde's general employment nor his activities had any direct relation of navigation or commerce.** Under such circumstances regulation of the rights, obligations, etc., **by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law.'** Justice McReynolds referred to the Garcia decision and said: 'The **present case is controlled by that case's principle'** and 'this conclusion accords with **Southern Pacific Co.** v. **Jensen.'** Rohde's suit in admiralty failed and he was remitted to his remedy under the state compensation act. The thesis that if injury may be labeled 'local' the state law **is made applicable was thus established"** . . . (Act Sec. 3.)

Id. p. 106:

"From the authorities we deduce: . . .

(3) If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of the admiralty unless (a) the contract is of merely 'local concern'; and (b) its performance has no direct effect upon navigation

or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters, when and only when the service is within exceptions (a), (b), and (c) above. (5) If, however, the injury occurs on navigable waters, but in the performance of a non-maritime contract, it is, at least prima facie, local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

Id. pp. 107-108:

"In the **Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England,** v. **Cook,** the Fifth Circuit Court of Appeals had before it the injury of a man employed by the Ford Company **primarily** as a mechanic assembling automobile parts, which, as they came in on Ford ships, were unloaded by the employees of the assembling plant. Cook, while engaged in unloading, was injured on board one of the ships by what the court called 'pure accident,' so that, unless under the State Compensation Act, there was no recovery as for a maritime tort. The Circuit Court applied the State Act, saying: "We think . . . that

the matter of unloading these ships . . . at rare intervals was 'of mere local concern.'"

Id. p. 110: At the end of note 67, it is said:

". . . The Act does not apply to non-maritime employment upon navigable waters. Injuries occurring in the latter status no doubt may be validly compensated under a State law if it so provides."

Id. pp. 119-120:

"Knudson's Case, Crowell v. Benson, the Supreme Court distinguished 'jurisdictional facts' and excepted them from the administrative finality otherwise recognized.' What has been said thus far relates to the determination of claims . . . within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the statutory scheme.' Should these conditions not exist, Chief Justice Hughes continued, 'there is no ground for the assertion that the person . . . in the absence of fault on his part be subjected to the liability which the statute creates.' For the application of the Harbor Workers' Act the workmen must be injured under the same conditions concerning locality which are required to be found as the basis of admiralty jurisdiction in tort generally."

At page 121, the learned author under the heading, "THE OCCUPATIONS WITHIN THE APPLICATION OF THE HARBOR WORKERS' AND LONGSHOREMEN'S ACT," said:

> "Not only must the locality be settled. **The man's occupation at the time of his injury must also be determined.**"

And at page 122:

> "The qualification is this: **even though the employee is injured while engaged in work on navigable waters,** his rights are to be determined under the state workmen's compensation act, if the enterprise upon which he is at the time **engaged is a purely local matter and not concerned with commerce or navigation . . . ."**

Od. p. 123:

> **"In re Herbert** Chief Justice Bugg for the Massachusetts Supreme Court held that the Compensation Act of the state was applicable in curious circumstances. Herbert worked on a scow, owned by the Coleman Disposal Company, and used to ferry garbage to an island two miles away in Boston Harbor. Herbert's job was to **sweep the scow** after its unloading, and he was at work while it tied up at the island when he fell overboard. **After reciting the standard** Supreme Court decisions the

> court said: 'It seems to us difficult to conceive of anything more local in its general nature . . . It does not appear that the deceased had any work directly connected with maritime affairs.'"

So it should have been held by this Court in the instant case, as it was in fact held by the Circuit Court of Appeals, 116 Fed. (2d) 791.

See also Id. pp. 131-132, 174:

> "There is no presumption in favor of jurisdiction, Ex parte Smith, 1876, 94 U. S. 455, 24 L. Ed. 207. It must affirmatively appear. Robertson v. Cease, 1878, 97 U. S. 646, 24 L. Ed. 1057."

"In Grant Smith-Porter Co. v. Rohde, (1927), 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321), to recover an award under a Workmen's Compensation Act from a shipbuilder for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette river (a navigable river), the court held, the contract for constructing the vessel was non-maritime, and although the uncompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment nor his activities at the time had any direct relation to navigation."

In Alaska Packers' Association v. Industrial Accident Commission, 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656, a person engaged by a fishing and canning

company as a seaman, also as a fisherman, and then for general work and about a cannery, was injured after the fishing season was over while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. It was held that that injury, even if within admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law, a ruling which would not injure the characteristic features or uniformity of the admiralty law." So it should have been held here.

"In Sultan Railway Co. v. Department of Labor and Industries of the State of Washington, 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820, an award for injuries under the Workmen's Compensation Law of Washington . . . was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms which had been towed on a river to a sawmill and the guiding of the logs to a conveyor extending into the river by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an incidental relation to navigation. The rights and obligations of the employees and their employers could well be regulated by local rules, which would not work material prejudice to the characteristic features of the general maritime law."

In South Chicago Coal & Dock Co., et al. v. Bassett, Deputy Commissioner, United States Employees' Compensation Commission, 60 Sup. Ct. Rep. 544, this Court held:

Syl. 1. "The general scheme of the Longshoremen's Compensation Act was to provide compensation to employees engaged in maritime employment, except as stated in the act, for disability or death resulting from injury occurring upon navigable waters of the United States, where recovery through workmen's compensation proceedings might not validly be provided by state law."

Syl. 8. "The purpose of the Longshoremen's Compensation Act was to provide compensation for a class of employees that worked on vessels in navigable waters, who although they might be classed as 'seamen' were regarded as distinct from 'members of a crew,' being employees whose service was that of laborers of the sort performed by longshoremen and harbor workers as distinguished from those employees on the vessel who were naturally and primarily on board to aid in her navigation.

"The question was required to be determined by the actual duties of the workman." (Syl 9.)

In Sultan Ry. Co. v. Dept. of Labor, Id. supra it was held that if the employee's work had any admiralty feature, it had only incidental relation to navigation, and that his rights and obligations of such employee and those of his employer could be regulated by local or State law without working

material prejudice to the characteristic feature of the general maritime law.

The opinion of this Court in the instant case appears to be in conflict with the above former decisions of this Court and has the effect of reversing them without referring to them.

B.

"Is the holding in accordance with the Longshoremen's and Harbor Workers' Act itself (Sec. 2(4)), and the former decisions of this Court, and the great weight of authority?"

This Court in its opinion, pp. 2 and 3, says:

"(2) The Circuit Court was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was 'so local in character' that Virginia could validly have included it under a state workmen's compensation act. This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made."

And on page 3:

> "If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress could have established exclusive federal jurisdiction, it is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. **Liability Assurance Co.** v. **Cook,** supra, 237. Congress having expressly kept out of the area in which 'recovery . . . may . . . validly be provided by State law,' the argument may be made that Virginia would have been unhampered in providing for compensation here."

The above opinion of this Court, paragraph "(2)" holds that, "Armistead was predominantly an employee in maritime." The Deputy Commissioner also found (R. 7) that Armistead "sustained personal injuries resulting in his death, **while he was employed as a janitor and handy-man,**" as did the District Court (R. 55) and the Circuit Court of Appeals (at R. 71-72; 116 F. (2d) 791). This Court is therefore admittedly dealing with injuries resulting in the death of a "non-maritime" employee on navigable waters.

We have quoted above from the former decisions of this Court on that issue, and, viewing this case both factually and under the Longshoremen's and Harbor Workers' Act, Armistead seems clearly not to come within the coverage or ambit of the Act. The Deputy Commissioner was therefore without juris-

diction to entertain the claim,—since Armistead was "a non-maritime' 'employee and compensation for "non-maritime" employees under all the decisions, State and Federal, heretofore rendered, may be validly provided by State law.

The latest work (1940), Benedict on Admiralty, Sixth Ed., Vol. 1, at pp. 65-66 (Sec. 30), under the heading,

"WORKMEN'S COMPENSATION LAWS; INJURIES IN NON-MARITIME EMPLOYMENT ON NAVIGABLE WATERS"

says:

> **"Injuries received on navigable waters in the course of a non-maritime employment (such as the original construction or outfitting of a vessel though already launched) may be comprehended within a State workmen's compensation act, at least if it be of an elective character so that employer and employee contract with reference to State law."**

The learned author there, in Note 17, beginning bottom of p. 62 and in note 21, pp. 63-65, cites the leading State and Federal cases in which it has been held that "State compensation laws" are applicable to "non-maritime" employees,—such as this Court held in its opinion that Armistead was,—citing **State Ind. Comm. of the State of New York** v. **Nordenholt Corp.**, 259 U. S. 263, 66 L. Ed. 933, 42 Sup. Ct. Rep.

473, in which the Court, referred on p. 273 to the Jensen case, and said:

> "His employment was a maritime contract; the injuries which he received were likewise maritime, and the rights and jurisdiction of the Deputy Commissioner there were matters in the admiralty jurisdiction."

This Court there further said:

> "The doctrine that 'locality' is the exclusive test of admiralty jurisdiction in matters of tort has been questioned in the Inbrobeck case and show beyond any doubt that the maritime rules applied as to Jensen's injuries, we used the quoted language" (above).

This Court then, at p. 275, cited the case of **Grant-Smith-Porter Ship Co.** v. **Rohde,** supra, where a carpenter working on a vessel lying in the Williamette River (navigable water), sought and recovered compensation under the Oregon Workmen's Compensation (State) law, and said:

> "The accident occurred on navigable water and the case was of a kind ordinarily within the admiralty jurisdiction and neither the general employee's contract nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter—**and we said, under such circumstances regulation of the rights, obligations**

> and subsequent liabilities of the parties, as between themselves, by a 'local' rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." Citing **Beach Fuel Company** v. **Garcia** to the same effect.

And at p. 276 this Court, concluding its opinion in the Garcia and Nordendyke cases, said:

> "There is no present Federal statute; and the application of the local law would not work material prejudice to any characteristic features of the general maritime law." Compare **N. Y. Central R. R. Co.** v. **Winfield** 244 U. S. 147; 37 Sup. Ct. Rep. 546, 61 L. Ed. 1045, L. R. A. 1918-C 439, Ann. Cases 1917-D 1139.

On p. 265, note 21, this Court cited **Miller's Indemnity Und.** v. **Brand,** 270 U. S. 59, 70 L. Ed. 470, 46 Sup. Ct. Rep. 194, and numerous other state cases. It then, referring to Maloney's case **(New Amsterdam Casualty Co.** v. **McManigal,** 1937, 87 Fed. (2d) 332 (C. C. A., 2d), said:

> "the local compensation act was allowed to apply to the injury of a carpenter engaged in building a lighthouse on a shoal in Lake Erie twelve miles from land."

Also see many other cases cited to the same effect

in Note 22, on page 66, including, **Jeffers** v. **Foundation Co.** (1936) 85, F. (2d) 24 C. C. A., (2d); **U. S. Casualty Co.** v. **Taylor,** 1933, 44 Fed. (2d), 521 (C. C. A. 4th), Certiorari denied, 290 U. S. 639.

The learned authority in Note 26 says:

> "It seems to be established that the Alaska cannery workers in small boats are engaged in 'local' work which may be covered by the California Workmen's Compensation Act: **Alaska Packers Assn.** v. **Marshall** (Nelson's and Erickson's Case), 95 Fed. (2d) 276 (C. C. A., 9th). Assuming that the work is "local," it would seem that the local (Alaskan) compensation law should apply."

It seems that the above former decisions of this and other Federal Courts in every respect similar to the instant case, decided on substantially the same evidence, facts and law, and the fact that Congress has never extended or attempted to extend the Longshoremen's and Harbor Workers' Act to "non-maritime" employees, whether their deaths occur on land or water, and especially where their employments are, as here, of a "local character"—such as janitors, porters, handy-men, chauffeurs, delivery-men and all others of a like kind or same class,—would be a sufficient answer to the holdings of this Court in the instant case and justify and merit a re-examination, reconsideration and re-determination of it.

Further, under the decision of this Honorable Court in the instant case,—**every employer in the United States of non-maritime employees may be held**

liable under the Longshoremen's and Harbor Workers' Act as now construed by this Court for compensation or damages, and this even though such non-maritime employees "of their own accord" (R. 45) go upon navigable waters and get injured or drowned, and even if they may have been "instructed and cautioned" as was admittedly the case here) "never to go on navigable waters or any other kind" while working for, driving the automobiles, trucks, delivery wagons and taking for their employers packages to the banks, landings or wharves on navigable streams.

The decision of this Court in the instant case is far-reaching in its holdings and implications, injurious to all employers of non-maritime employees, and of the greatest public interest.

3. PROCEEDINGS BEFORE DEPUTY COMMISSIONER AND THIS COURT, VOID.

This Court, Op. p. 5-6, says:

> "The respondent further contends that the award was void under Sec. 5 of the Act."

Sec. 2 of the Act 2(4) reads:

> "The term employer means an employer whose employees are employed in maritime employment, . . . upon the navigable waters of the United States."

Sec. 4(a) provides:

> "Every employer (whose employees are employed in maritime employment) shall be liable for and secure payment to them" (such employees) "of . . . compensation" . . . (Parenthesis supplied.)

Sec. 5 provides:

> "The liability of an employer prescribed in Sec. 4 shall be exclusive and in place of all other liability of (such) employer to (such) employee; his legal representatives . . . except that if an employer fails to secure employment of the compensation as required by this Act, his injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty on account of such injury or death." (Parenthesis supplied.)

It is thus seen that by the **express** language of the Act the only persons who can claim or "elect to claim" compensation under this Act or to maintain an action at law . . . on account of such injury or death, are: (1) the injured employee; or (2) "His 'legal representative' in case of death resulting from such injury" to such employee.

The Act **nowhere** authorizes the "widow" of a decedent employee "to elect to claim" compensation under this Act, or to maintain an action at law on account of the death of her **deceased** injured employee.

The issue now before this Court is: Does a United States Deputy Commissioner have any **substantive** or **administrative** power except such as is created and established by the L. S. & H. W. Comp. Act.

It is respectfully urged that a United States Deputy Commissioner has no power or jurisdiction except such as is conferred upon him by the Act; and as stated, supra, the Act of Congress expressly conferred in the Act the sole right to "elect and claim compensation under the Act, or to maintain an action at law, **only** upon two persons, viz.: an injured "employee" employed in maritime employment, or "his legal representative" in case of his death. In the instant case the record shows and it is admitted that Armistead, the employee, was dead; that no "legal representative of Armistead has ever been appointed." Here the claim was filed by his widow. (Op., p. 6.)

This is a case, therefore, where the jurisdiction of the Deputy Commissioner was created by statute and where the statute expressly—in terms—provides what persons may "elect" to claim "compensation under the Act," viz.: the injured employee, if he be living, or his legal representative in case of such employee's death, and the mode of acquiring and exercising that jurisdiction is prescribed by the statute. It is respectfully submitted that under all of the authorities dealing with this situation that a compliance with the express mandate of the statute by the only person authorized to elect to claim compensation under the act, or to maintain an action at law, are to be complied with, and this not having been done,—the proceeding is a nullity and the award of the Deputy Commissioner was void.

This Honorable Court has so held in all of its former decisions. See cases cited on pp. 81-85 of the Brief of the respondent, Motor Boat Sales, Incorporated, heretofore filed in this Court.

It is further well established that jurisdiction to institute a proceeding in the Federal courts and before administrative bodies created by the Acts of Congress, and the jurisdiction to hear and to determine claims or demands must exist before any award, decree or judgment therein can have any force or finality whatever.

The award of the Deputy Commissioner therefore, in the instant case was void **abinitio** and **in toto** for the failure of the "legal representative" of Armistead, the decedent, to "elect" and to file a claim or demand for compensation under the Act.

In every case instituted in a court there must not only be jurisdiction of the cause of action in the court, but there must be jurisdiction of the person instituting the suit. The suit must be brought by a person having the legal right, authorized by law,—in the manner prescribed in the Act, otherwise the award, judgment, or decree is void and should be set aside.

It would seem that these principles are so elementary and fundamental and have been so uniformly recognized by the Courts that the citation of authorities would be a work of supererogation. **Am. R. Co. v. Burch, 225** U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. Rep 603, this Court, passing upon "a suit brought by the widow and son of a decedent," and not by his administration or legal representatives, it was contended that the widow and child being the sole beneficiaries might maintain the action without the ap-

pointment of a personal representative, and this Court

> "denied the contention and held that Congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative; and the judgment was reversed without prejudice to the right of the personal representative."

In **Dennison** v. **Payne**, 293 Fed. 333, at 341, the Circuit Court of Appeals for the Second Circuit held:

> "And the law is equally well settled that if a court, officer or board has acted without authority in the premises, its decision is not merely voidable, but void, and affords no protection to those claiming under it."

It again, at p. 342, said:

> "The Federal Employers' Liability Act gives the right of action in case of death of one employed in Interstate Commerce 'to his or her personal representative.'"

Am. R. Co. v. **Burch**, supra, where the suit was instituted by the widow and son of the decedent as sole beneficiaries and not by the administrator, said:

> "The Supreme Court, however, held that the action could **not** be maintained, but could be brought **only** in the name of the personal

> representative, and reversed the judgment without prejudice to the personal representative."

So it should have been held by the Honorable Court in the instant case, for, as was said by this Court in the above case:

> "Congress, doubtless for good reasons, specifically provided that the claim or proceedings under the Longshoremen's and Harbor Workers' Act could only be brought by and in the name of the legal representative of the decedent employee in maritime."

The right of action created by the Act here was given **only** to the "legal representative" of the deceased employee. No such right is conferred by the Act upon his widow. This provision of the statute is mandatory. The fact that a claim was filed by the widow—a person not authorized by law to do so—and who had no right to "elect" or to make a claim for compensation under the Act, would not give the Deputy Commissioner jurisdiction or make valid any award rendered by him in her favor. A claim filed by such person and award made to her is void **abinitio** and **in toto.** Certainly the Deputy Commissioner of the United States, himself a creature of the statute, could not authorize the widow to make such election and file such claim; nor could such Deputy Commissioner by making forms, "SUCH AS CLAIM FOR COMPENSATION IN A DEATH CASE BY A WIDOW," confer upon her a cause of

action, or give her the legal right or authority to elect or to file such claim for compensation.

As was said in Montgomery's Manual of Federal Jurisdiction and Procedure, 3rd Ed., Sec. 92, at p. 73:

> "As to whether the case is within the scope of its jurisdiction, is a question which the court is bound to examine and determine, although not presented by the parties,—and even where they consent to a determination of the controversy on its merits. 'Consent cannot confer jurisdiction, and want of jurisdiction cannot be waived.' The same obligation rests upon a reviewing court; and on every court; and on every writ of error or appeal, the preliminary inquiry is to the jurisdiction (1) of the appellate court, and (2) of the court from which the record comes. And, inasmuch as a federal court is a court of limited jurisdiction, the fact that the case is one of which the court may take cognizance must appear affirmatively from the record,—otherwise a reversal must be ordered. 'Unless the contrary affirmatively appears,' a presumption will be indulged that a cause is not within the court's jurisdiction."

New England Nat. Bank v. **Calhoun,** (C. C. A., N. M.) 9 Fed. (2d) 272; **New York Life Ins. Co.** v. **Johnson,** (C. C. A., Iowa) 255 Fed. 958; **Perez** v. **Canadian Land & Fur Co.,** (D. C., La.) 14 Fed. (2d) 181; **McLaughlin** v. **Western Union Tel. Co.,** (D. C., La.) Fed. (2d) 177, 179; **King Iron Bridge Co.** v. **Otoe County,** (1887) 120 U. S. 225, 30, L. Ed. 623, 7 Sup.

> Ct. Rep. 552; **Highway Const. Co. v. McClelland,** (C. C. A., Mo.) 14 Fed. (2d) 406; **Rosenberg v. Shuler,** (D. C., Okl.) 289 Fed. 820, 821; **Danks v. Gordon,** (C. C. A., N. Y.) 272 Fed. 821; **O'Neill v. Co-operative League of America,** (D. C., Pa.) 278 Fed. 737.

The statement made in the opinion of this Court (Op. p. 6):

> "Since the respondent did not contest the widow's capacity to file a claim either before the Deputy Commissioner, or in the District Court, the objection, even if otherwise meritorious, was made too late." Cf. **McCandless v. Farland,** 293 U. S. 67."

even if true, it is submitted would not confer legal capacity on the widow (who had no lawful authority to file the claim), or on the Deputy Commissioner to entertain a claim made or filed by a person who had no lawful authority to do so—no cause of action; no right to elect or to assert a claim. Here, however, this Court also appears to be in error in making its above statement. For the record shows (R. 13) that the respondent **(under "Statement of Defense")** made

> "All the defenses that can be made under the act, or under the general issues where the facts are controverted."

And since, further, the Bill of Complaint filed in the

U. S. District Court (R. p. 2-3, par. 5), among other things alleged, top of page 3, . . . :

> "that the plaintiff employer gave notice to the Deputy Commissioner that the claim would be controverted and all defenses made under the Longshoremen's and Harbor Workers' Act, that could be lawfully made,"

and (R. p. 4, par. 7) said:

> "That the claim of claimant for compensation on account of the death of George P. Armistead, Jr., does not fall within the coverage of the Longshoremen's and Harbor Workers' Act; that he (the Deputy Commissioner) was without jurisdiction to entertain such claim" . . .

The decision of this Court in the instant case also raises a conflict with that of the Circuit Court of Appeals in **Chapman** v. **Griffith Consumers' Co.** (1939) 107 Fed. (2d) 263, where that Court held that the Act did not create "in the next of kin (widow) the right to maintain such action." There the suit was brought by an insurance company and by the "next of kin." Here it was brought by the widow, who had no more right to bring the suit than the "next of kin." This Court in its opinion (p. 5-6) is in conflict with this decision and apparently overrules it, without referring to it.

(4) CASES CITED IN OPINION OF THIS COURT NOT IN POINT

This Court, in its opinion, 3-4, refers to the case of **So. Pac. Co.** vs. **Jensen,** 244 U. S. 205, as if it were here in point and sustained its decision, and says it severs the link in the chain of reasoning "that Congress having expressly kept out of the area in which recovery may validly be provided by State law, the argument may be made that Virginia would have been unhampered in providing for compensation." This Court here overlooks the fact that Jensen's contract of employment was "in maritime" and that he was killed on a ship located on navigable waters where he had been set to work while performing the work he had been both employed and required to do. Consequently, his employment, work and the locus of his employment were all "maritime"; whereas, in the instant case, Armistead was employed as a janitor, porter or handy-man (R. 7, Finding of Deputy Commissioner), and, as was said by this Court, he "was predominantly a non-maritime employee" and was not hired, sent to or set to work on navigable waters. Under Jensen's contract of employment he was employed in "maritime employment" and set to work on navigable waters. In the instant case Armistead was a "non-maritime" employee employed to work on land, with instructions never to work on navigable waters.

In **Voehl** v. **Indemnity Insurance Co.,** 288 U. S. 162, cited in the opinion of this Court, at p. 2, as sustaining its ambiguous and doubtful holding that, "Granting that more than one possible conclusion

could have been reached upon the evidence," etc., the injury occurred in the District of Columbia, where the Act applied to injuries occurring both on land and water. There this Court held that there was no doubt of the power of Congress to invest deputy commissioners with authority to determine the question as to whether or not Voehl's injury arose out of and in the course of his employment. There this Court expressly held that the decision of that question determined on the general nature and scope of the employee's duties, the particular instructions he had received and the practice which obtained, and there was affirmative evidence to show that Voehl was injured in work he had been hired to do and had constantly and repeatedly done.

In the instant case, Armistead was not an employee in maritime within the purview of the Longshoremen's and Harbor Workers' Act. He was employed as a janitor and porter and, as this Court said, was predominantly a non-maritime employee, and had been particularly instructed never to go on navigable waters while doing any work for his employer, and he disregarded his contract of employment, his specific duties and the particular instructions he had received. It is therefore respectfully submitted that the Voehl case not only does not sustain this Court's holding, but it shows the very reverse, and that Armistead by reason of the fact that he violated his contract of employment, the specific duties he had been employed to do, and the instructions he had received was not entitled to recover.

The Northern Coal Co. v. **Straud,** 278 U. S. 142,

at 144, 49 Sup. Ct. Rep. 88, cited in the opinion of this Court at p. 3 as sustaining its decision is not in point. Strand was employed "in maritime" to work on vessels lying in navigable waters unloading them, and was killed while doing that "Longshoremen and Harbor Workers'" work on one of the vessels. There his contract of employment and the locus of his work and death were all on navigable waters and his work was "concerned" with navigation and commerce; whereas in the instant case Armistead was employed as a "janitor" and "porter" to work at the respondent's store and was "particularly instructed and cautioned never to work on navigable waters or any other kind," and, as was said by this Court in its opinion, "was predominantly a non-maritime employee," with no duties to perform on navigable waters or that required him to go thereon.

This is also true of the case of **Employers Liability Assurance Co., Ltd.** v. **Cook,** 281 U. S. 233, 236, 50 Sup. Ct. Rep. 308, cited in the opinion of the Court at p. 3. There Cook was employed as a steveadore to unload a ship lying in navigable waters, and this Court held "that he was a seaman within the meaning of the Jones Act, 41 Stat. 107, 46 U. S. C. A., Sec. 688," and that "Congress had occupied that field" and had thereby excluded all State legislation and said: "I am content to rest this case on that ground. It further said: " . . . I do not agree that the present case is so exclusively controlled by the maritime law that workmen otherwise in the situation of respondent, but who are not seamen and who therefore are not given a remedy by the Jones Act, and who are not within the purview of the Employers Liability Act

. . . . , are excluded from the benefit of a (State) compensation act like that of Texas," that is, the **State** may validly provide compensation for the **class** of employees not seamen or longshoremen and harbor workers, citing **Rosengrant** v. **Harvard,** 273 U. S. 664, and **John Baizley Iron Works** v. **Span,** 281 U. S. 222. This Court then cited the Harbor Workers' Act and said: "But the remedies given by that Act are **withheld** where recovery may be had under local compensation acts," as is the instant case.

This Court reaffirmed the doctrine of the Jensen case, supra, in **Knickerbocker Ice Co.** v. **Stewart,** 253 U. S. 149, and **Washington** v. **Dawson & Co.,** 264 U. S. 219, holding, as the Circuit Court of Appeals did in the instant case.

facts of the instant case, as disclosed by the record or the Longshoremen's and Harbor Workers' Act as construed by the Circuit Court of Appeals for this Court to reconsider either the factual findings of the C. C. A. or the constitutional principles imposed in the above cases of **Knickerbocker** v. **Stewart** and **Washington** v. **Dawson.**

> "(3) It is settled by our decisions that, where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations, and liabilities of the parties as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. **Grant Smith-Porter Co.** v.

Rohde, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; **Miller's Indemnity Underwriters** v. **Braud,** 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470; **Alaska Packers' Association** v. **Industrial Accident Commission** (April 9, 1928) 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656."

A fortiori is this true where the employee is "non-maritime," and this Court held that Armistead "was predominantly a non-maritime employee" (Op. top p. 3), and the work has no "direct relation to navigation or commerce," but is "local" in character,—such as is the work of janitors, porters, handy-men, chauffeurs, delivery men, and the like. They clearly do not fall within the purview of the Longshoremen's and Harbor Workers' Compensation Act, and any injuries they may sustain in the course of their employment may validly be provided by State law without working any material prejudice to the essential features of the general maritime law or the Longshoremen's and Harbor Workers' Act. **Western Fuel Co.** v. **Garcia,** 257 U. S. 233, 242, 42 S. Ct. 89, L. Ed. 210; **Grant Smith-Porter Co.** v. **Rohde,** 257 U. S. 469, 477, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; **Millers' Indemnity Underwriters** v. **Braud,** 270 U. S. 59, 64, 46 S. Ct. 194, 70 L. Ed. 470; **Sultan Railway & Timber Co.** v. **Department of Labor,** 277 U. S. 135, 137, 38 S. Ct. 505, 72 L. Ed. 820; **Baizley Iron Works** v. **Span,** at pages 230, 231 of 281 U. S., 50 S. Ct. 306; **Red Cross Line** v. **Atlantic Fruit Co.,** 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582.

It is respectfully submitted that this Court should

re-examine its decision in the instant case in the light of the facts disclosed by the record when compared with those in the Voehl case, in which two cases this Court has apparently made directly opposite holdings. (See par. 1 and 2 of the Voehl case).

Noguira v. **N. Y., New Haven & Hart. Co.**, 281, U. S. 138, is likewise not in point. There Noguira's employment was for loading freight into railroad cars on a float lying in navigable waters at a pier, and he was injured while he was engaged in performing the work he had been employed and ordered to do, which required him to go on navigable waters. Again the locus of the injury, the contract of employment and the work he was required to do and was performing were all in maritime. Here the facts are the very reverse.

The above cases are clearly not controlling here.

In concluding this brief, it is with great deference that a re-examination, reconsideration and re-determination of the decision of this Court in the instant case is asked by this,—one of the highest courts of all the world and a court of last resort,—for the reasons set out in the petition and in this brief and because the decision of this Court is so far-reaching and injurious that it affects all employers of non-maritime employees and renders such employers liable to such "class" of employees for compensation or damages occurring to them on navigable waters, who may go thereon in breach of their contracts of employment and in disregard and disobedience of the positive instructions which may be given to them "never to go on navigable waters." Until the decision

of this Court in the instant case employers had believed that the obligations of their contracts of employment with their employees made it the duty of such employees to perform the contracts and obey the instructions given them according to their terms, and that the Longshoremen's and Harbor Workers' Act was intended to recognize the **sanctity** of contracts and enforce their obligations and the duties imposed by them on the part of the employee as well as of the employer, and that the Act did not provide compensation sustained by a non-maritime employee for doing any act he had not been employed, directed or required to do and done in violation of his contract and the instructions given him.

Therefore, in the interest of your petitioner and all other employers of "non-maritime" employees, and the public and of the Federal Courts and the establishment of a uniform holding in accordance with the evidence and the Act and the public interest, a rehearing should be granted.

Wherefore, it is respectfully and earnestly prayed that this Court rehear, re-examine, reconsider and redetermine its decision and order of this Court made in petitioner's case on December 8, 1941, reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court.

Respectfully submitted,

M. J. FULTON,
Counsel for Petitioner

Dec. 30, 1941.

ADDENDA.

ANALYSIS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT.

To come within the coverage of the Act the injured employee, or his legal representative in case of his death (Act sec. 5), must establish by evidence four conditions:

(1) That the injury or death "arose out of and in the course of his employment" (Act sec. 2(2),

(2) He must have been employed as a longshoreman or harbor worker by his employer to work in maritime in whole or part on a vessel engaged in commerce or navigation on the navigable waters of the United States (including any dry dock.) (Act sec. 2(3);

(3) His injury or death must have occurred under such circumstances "that compensation therefor may not validly be provided by State law" (Act sec. 3(a); and

(4) He must not be a master or member of a crew of a vessel, etc. (Act sec. 3(a), (1), (2), (b).

The Act makes the above four requirements "fundamental and jurisdictional"—conditions precedent—which must be established by evidence **before** any finding or award can be made by a United States deputy commissioner against an employer, and the findings of a deputy commissioner as to those "fundamen-

tal and jurisdictional facts" are not "final"; but, under Section 21 (a) and (b) of the Act, are made **subject to review** and determination by the Federal courts, which are expressly given the power to review and determine their existence for themselves, "based upon vidence submitted to those courts," and to "set aside" such order.

> Sec. 21(a) of the Act provides:
>
> "A compensation order shall become effective when filed * * *, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

> Sec. (b) provides:
>
> **"If not in accordance with law** a compensation order **may be suspended or set aside** in whole or part through . . . proceedings . . . brought . . . against the deputy commissioner making the order, . . . in the Federal District Court . . . in which the injury occurred. . . . The order of the Court . . . **shall** contain a specific finding, **based upon evidence submitted to the court."**

Is this power to be denied to the Federal courts?

The Act expressly confers upon the Federal courts the power to "review and set aside" the compensation order of a deputy commissioner, "if not in accordance with law."

It contains no express or implied limitation

upon the powers of the Court to review and set aside the compensation order if not "in accordance with law."

Crowell v. **Benson** (Knudsen's case) (1929) 33 F. (2d) 137 (S. D. Ala.), (aff'd. 1931) 45 F. (2d) 66 (CCA 5th), (aff'd. 1932) 285 U. S. 22, 76 L. (ed) 598, 52 S. Ct. 285; **So. Chic. Coal and Dock Co.** v. **Bassett, Dep. Comns.** (1939), 60 S. Ct. 544; **Massman Constr. Co.** v. **Bassett, Dep. Comnr.** (1940), 30 F. Supp. 813.

Act sec. 21(a) does not compel the Federal courts in reviewing the findings of the deputy commissioner to accept them or to be bound by the evidence introduced before the deputy commissioner or his finding or award in determining as to whether his compensation order is "in accordance with law." Crowell-Benson, 52 S. Ct. 295, 297.

The mandate of the Act is, that the Federal courts, if a proceeding is instituted within thirty days after the entry of the compensation order, may set aside "such order of the deputy commissioner," but that the Court's order so "setting aside" the finding of the deputy commissioner, **shall** "contain the specific finding, **based upon evidence submitted to the court.**

The Act and the former decisions of this Court clearly show that the Federal courts in reviewing and "setting aside" the finding or compensation order of a deputy commissioner are not bound by the evidence, his findings, or his compensation order,—but the courts may determine for themselves those "fundamental and jurisdictional" questions independently

of the finding of the deputy commissioner. If it does it is unconstitutional and deprives them of their rights and property without due process of law and of the judgment our Constitutional courts.

Mr. Justice Brandeis, in his dissenting opinion in the Crowell-Benson case supra, suggested that "a broader power of review" would follow the decision of this Court in that case, and gave some of the grounds for that review, and which grounds have since been reviewed and tried de novo by the courts, among which are the following, "wilful intent to injure," "injuries arising out of and in course of employment," **So. Shippg. Co.** v. **Lawson** (1939), 5 F. Supp. 321 (S. D. Fla.), "non-maritime employment," **Green** v. **Crowell** (1934), 69 F. (2d) 762 (CCA 5th) Certiorari denied 293 U. S. 554, 79 L. (ed) 656, 55 S. Ct. 88.

The compensation Act applies to "longshoremen and harbor workers." It makes no attempt to encroach upon State or local jurisdiction, but expressly provides, "if state law may be validly provided"—then the Federal Act does not.

The Jensen case does not "sever this link" (Op. p. 3),—because it was decided **before** the Act which placed the limitation laid down in Section 3(a) on the holding in the Jensen and **Knickerbocker Ice Company** v. **Stewart** cases (Op. p. 3 Note 2). Congress by Section 3 a) "severed the link in the chain of reasoning" in the Jensen case the other way round—in favor of "providing compensation by state laws wherever it might validly be so provided." Lex ita est.

Section 12 of the Act says "notice" of the death

of an employee may be given by any person—not that any person may file the claim or sue.

Section 19 of the Act is that the party authorized to "file the claim" or sue may do so "in accordance with regulations"—forms—"prescribed by the Commission"—not that the "widow" or any other unauthorized person may file the claim or sue and become the litigant. Deputy commissioners are right powerful as to making forms, but Congress has not yet given them the power to make or create causes of action or to take them away from those to whom Congress expressly gave them, or to legislate or amend the Statute by making forms or regulations.

Suffice it to say as to the McCandless Furland 293 U. S. 67 cited in the opinion of this court at page 6, that it is believed that a reexamination of it by this court will show that it never attempted to give a cause or right of action to file the claim or sue to a person who had none. There the party had the right or cause of action to sue; here the party filing the claim had no right to do so. The statute in direct and positive language created the cause or right of action and gave it to the "legal representative" of the deceased employee—not the widow or to any other than the "legal representative." It is believed that this court does not mean to hold that a deputy commissioner can deplete the Act and amend it or substitute the "widow" or any other person for the "legal representative." Yet, that is precisely the effect of the holding in the instant case—or can it be that this court intended its holding to be "ambiguous and doubtful," as the holding on page 1, (paragraph 1)

appears on its face to be; "Granting that more than one possible conclusion could have been reached, we think" . . . . . one of the conclusions "clearly supports" the finding—and to here give the "widow" the cause of action, and not the "legal representatives." It is not believed that this court intended to leave such an important substantial right open to such doubtful conclusion nor to take it away from the "legal representative" on whom Congress conferred the right to file the claim.

It may be that the failure to clearly present this view to the court was the fault of the writer of this brief who at the time of the oral argument was quite indisposed, and he assumes the fault of not making the issues and statute clear to the court and its importance to all litigants and to the Federal Courts.

MINITREE JONES FULTON,
Counsel for Petitioner.

Dec. 30, 1941.

APPENDIX

George W. Todd testified:

R. 22:

"Q. Whose boat was it in which they were riding there at the time?

"A. The boat belonged to Mr. W. M. Crown and his brother. . . .

R. 23:

"Q. How often would your employees go aboard a boat; every day?

"A. No, sir; not every day. It was just a rarity that we got on boats.

"We haven't got any business getting on other people's boats."

George W. Todd testified: (R. 23):

"It was just a rarity that we got on boats. We have not got any business getting on other people's boats" (R. 23).

W. Earl Lloyd testified: (R. 28-29):

R. 28:

"Q. You were in the shop the day he (Armistead) went down the river and was drowned?

"A. Yes.

"Q. I will ask you if he was not sent down by his employer **to assist in lifting two motors**?

"A. Yes, sir.

"Q. Wh went with him?

"A. J nny Cooper."

Randolph Hobbs testified, R. 34: That he was employed on August 8th, the day George Armistead was drowned. R. 35: That George was employed as a porter; that George filled out his social security cards and signed them, and that they stated that his position was that of porter. R. 36: George Armistead at the time was instructed to go along to help lift these motors from the car to the boat . . . and to help load and unload them" . . .

R. 37:

"Q. You can state whether he was to go down to the river and what (he) was going for?

"A. He was not instructed to go in the boat.

"Q. At any time?

"A. No, sir. (R. 37) . . .

R. 38:

"Q. You did not tell him what to do that day?

"A. Not particularly that day, **but George was instructed not to get on boats and he was particularly instructed about that.**

"Q. You said he was given particular instructions. Did he have any authority or instructions to ride on boats, or to ride on navigable rivers or any other kind of rivers?

"A. No, sir. . . .

"Q. He would have to get in the boat if his job was to lift it in the boat?

"A. Not particularly. The stern was pulled up on the shore and the motor was attached to it (R. 38).

BY MR. PARRISH:

R. 39:

"Q. Generally, the purpose was for him to assist in helping take the motors and put them in the car from the shop and out into the car and out of the car on the boat and back off the boat into the car and back into the shop?

"A. Yes, sir. . . .

"Q. He was purely in the capacity of a strong-arm man, to help the mechanic get it from land to water? . . .

"Q. And he left the store under those instructions. Had he authority or directions from you while there to go out on the river riding on a boat that was operated in deep water?

"A. Not any kind of water."

W. L. Lloyd, recalled, testified:

R. 40:

"Q. What did you tell George Armistead to do?

"A. " . . . George was instructed to help Johnny take it off the trailer and help put it on the boat, **but he was not instructed to ride in the boat.**

"Q. And he left the store under those instructions. He had authority or directions from you while there to go out on the river, riding on a boat that was operated in deep water?

"A. Not any kind of water." . . .

BY THE DEPUTY COMMISSIONER:

"Q. He was instructed to help get the motors out of the trailer on to the boat and when done to reverse the procedure?

"A. That is right. . . .

"Q. Was that as far as your instructions went; to take the equipment down and . . . bring it back?

"A. Yes; that is right." . . .

William Crown, one of the owners of the boat, testified:

R. 41:

That the boat was his brother's, but that he had charge of it at that time . . .took it on his trailer to the James River. . . .

"I don't know whether we got there first, or George or Johnny, and we took the boat and put . . . one end of it in the river and the other end on the bank . . . and George stands on the bank and lifts it in the boat." . . .

"Q. Was George Armistead directed by you or by Johnny Cooper, the boy that went with the Motor Sales down, to get into your boat and ride, or was he ordered and directed not to?

"A. Yes, sir."

R. 42:

"Q. Did he have any work to do on the boat?

"A. None at all.

"Q. You were there when he was told to go down with these motors?

"A. Yes, sir.

"Q. You were present when they got down there?

"A. Yes, sir.

"Q. And you never heard anyone tell George to get in the boat and ride?

"A. No, sir.

"Q. Was it your boat that capsized in the river when George got drowned?

"A. Yes, sir." . . .

John Samuel testified:

R. 45:

"A. George . . . was going down . . . to the river to help me.

"Q. Help you do what?

"A. Take the motor off the trailer and put it on the boat and take it off when finished.

"Q. Did he have duties in running a motor on out in the water?

"A. Not to my knowledge.

"Q. Did you instruct him to go in the boat or did he go on of his own accord, for a pleasure ride?

"A. He went on his own accord.

"Q. You were up there when you were told to take the motor down and he (George) went along to help unload the motors from the trailer and attach them to the boats and take them and put them back in the trailer?

"A. Yes, sir.

"A. And they were his sole duties?

"A. Yes, sir.

"Q. And you never gave him any and you didn't hear anybody give him any duties to go on water?

"A. Not to my knowledge."

R. 46:

"Q. When those motors were taken off the trailer and each one was attached to the boat, where was the motor of the boat?

"A. Sitting on the shore, like Mr. Crown said. . . .

"Q. At the time the accident happened who was driving the boat?

"A. I was driving the boat."

BY MR. PARRISH:

"Q. You did not tell George not to get in that boat on each occasion?

"A. No, sir." . . .

BY MR. FULTON:

"Q. You did not tell him to get in the boat?

"A. No, sir.

"Q. He had no instructions to operate the boat on the river?

"A. No, sir."

R. 47:

"Q. He had no instructions either way?

"A. No, sir."

BY MR. PARRISH:

R. 47:

"Q. He had no instructions either way?

"A. No, sir. . . .

"Q. You could handle it all right either by yourself or with somebody else?

"A. Yes, sir.

"Q. He did not do anything to assist you?

"A. No, sir; he did sit in the front and keep a lookout. . . .

"Q. Did you give him any orders to sit in front?

"A. No, sir.

"Q. There was a seat up front and he was sitting there?

"A. Yes, sir."

. . . . . .

R. 48:

"Q. Was it necessary for George to help hook them (batteries) up?

"A. I did it myself.

R. 49:

BY THE DEPUTY COMMISSIONER:

"Q. How often did you go down to work on the boat?

"A. Not very often. This was the first time I had been down for some time.

"Q. Did you go on other trips?

"A. I had a boat of my own.

"Q. Did you go for the Company on similar jobs and put a motor on a boat and test it out?

"A. Not that I remember.

"Q. This was the only time?

"A. Yes."

S. King Fulton, the President of the Motor Boat Sales, testified, R. 49, that he hired this boy, George Armistead, who was drowned on August 8, 1938:

"Q. What were his duties?

"A. He was a porter and operated under my supervision in December 1937.

"Q. Were his duties ever changed? . . .

"A. No, sir.

"Q. What instructions did you give him and other employees generally when they delivered things about going in other people's boats?

"A. George was cautioned not to go into a boat or to have anything to do with a boat or motors, as explained by Mr. Hobbs. . . . I laid the law down very rigidly in regard to that. I think everybody in the store knew my ruling . . . not to go out in a river or boats for anybody.

"Q. Was he employed to work on a boat?

"A. No, sir."

The above evidence stands uncontradicted in the record.

p. 5

SUPREME COURT OF THE UNITED STATES.

No. 46.—October Term, 1941.

E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, Petitioner,
vs.
Motor Boat Sales, Incorporated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 8, 1941.]

Mr. Justice Black delivered the opinion of the Court.

August 18, 1938, George Armistead was drowned when a motor boat in which he was riding capsized on the James River off Richmond, Virginia. The boat was navigated by one Johnnie Cooper. Both Armistead and Cooper were employees of the respondent, Motor Boat Sales, Incorporated, which sold small boats, maritime supplies, and outboard motors. The object of the ill-fated boat trip was to test one of the respondent's outboard motors, which it desired to sell, and later did sell, to the owner of the boat. The petitioner, Deputy Commissioner of the United States Employees' Compensation Commission, under authority of Section 19 of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, after complaint, investigation, and hearings, ordered the respondent to pay compensation to Armistead's widow for the benefit of herself and three minor children. Among the findings on which the Deputy based his order were these: that Armistead's death by drowning, "arose out of and in the course of his employment; that his death occurred upon navigable waters; and that at the time of his death he was engaged in maritime employment." Section 21(b) of the Act provides that if a Deputy Commissioner's award is not made in accordance with law, Federal District Courts may enjoin enforcement of it upon petition of any party in interest. In proceedings initiated by the respondent under this Section, the District Court sustained the award, dismissing the bill on the ground that the findings of fact were supported by evidence and were therefore conclusive, and that the Commissioner's conclusions and award were

in accordance with law. The Circuit Court of Appeals reversed, advancing two reasons for its conclusion: (1) Armistead was not acting in the course of his employment at the time of the accident; and (2) even if he had been, recovery was barred by Section 3(a) of the Act making compensation payable "only if . . . recovery for the disability or death through workmen's compensation may not validly be provided by State law."

(1) The Circuit Court's conclusion that Armistead was not acting in the course of his employment rests upon a revaluation of the evidence before the Deputy Commissioner. It is true that the respondent's president testified that "George was cautioned never to go into a boat or have anything to do with a boat or motor", but this rule was laid down "prior to November 1937" and the accident occurred in August, 1938. Against whatever inferences to be drawn from testimony regarding this general and rather remotely announced rule are the inferences to be drawn from testimony that on the morning of the accident Armistead was sent to the river with specific instructions to help Cooper in placing the outboard motors on the boat; that there were no specific instructions as to whether or not Armistead was to stay out of the boat; that either Armistead or Cooper was told that Armistead was "to go and help" Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to "keep a lookout" for hidden objects in the muddy water; that Cooper regarded Armistead's acting as lookout as "helpful"; that employees of the respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf. Granting that more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that Armistead was acting in the course of his employment. The Circuit Court of Appeals should therefore have accepted it as final. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162.

(2) The Circuit Court was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was "so local in character" that Virginia could validly have included it under a state workmen's compensation act. This proposition

cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity[1] that the award was here made. Cf. *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 144; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233, 236. Moreover, Section 2(4) of the Act expressly provides for its application to "employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States."

If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress *could* have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. *Liability Assurance Co.* v. *Cook*, *supra*, 237. Congress having expressly kept out of the area in which "recovery . . . may . . . validly be provided by State law," the argument may be made that Virginia would have been unhampered in providing for compensation here.

The decision of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action,[2] federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits,[3] doubtless embraces the case before us. The basis of the decision, that Article

[1] Cf. The Moses Taylor, 4 Wall. 411, 427; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58-63; Industrial Comm. v. Nordenholt Co., 259 U. S. 263, 272-273; Smith & Son v. Taylor, 276 U. S. 179, 181; London Co. v. Industrial Comm'n., 279 U. S. 109, 123, 125.

[2] While reference was made in the majority opinion of the Jensen case to § 9 of the Judiciary Act of 1789, 1 Stat. 76, 77, there is no implication that the Court regarded this statute as an "occupation" by Congress of a field otherwise of concurrent jurisdiction. And in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 157-158, the Court explained the Jensen case entirely in terms of the exclusive federal jurisdiction created by Article III, § 2, and Article I, § 8, of the Constitution. Reference to § 9 of the Judiciary Act of 1789 was made only for the purpose of pointing out that a clause embodied in it, which saved certain common law remedies, "had no application."

[3] Cf.: "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." Southern Pacific Co. v. Jensen, *supra*, 216.

III, § 2, of the Constitution extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, was rejected by four dissenting members of the Court. And when the doctrine of the *Jensen* case was reaffirmed in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *Washington* v. *Dawson & Co.*, 264 U. S. 219, sharp disagreement was again expressed in dissenting opinions. We have not been called upon here, however, to reconsider the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

What we are called upon to decide is not of constitutional magnitude. For regardless of whether or not the limitation on the power of states set out in the *Jensen* case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of Section 3(a) aside, there would be no difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents "arising out of and in the course of employment" in the case of employees engaged "in maritime employment, in whole or in part, upon the navigable waters of the United States", and Armistead's death was the result of such an accident. While the proviso of Section 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide.

In the report of the Senate Committee on the Judiciary accompanying the bill which was enacted as the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess. 16, this avowal of Congressional purpose appears:

"If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation. (Southern Pacific Co. *v.* Jensen, 244 U. S. 205; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149; Washington *v.* Dawson & Co., 264 U. S. 219.)

"It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute."

There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. The proviso permitting recovery where compensation "may not validly be provided by State law" cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.

The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence.

3) The respondent further contends that the award was void under Section 5 of the Act. This section, set out in full in the margin below,[4] states that "an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act . . . ." The record does

[4] "Sec. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

not indicate that a "legal representative" of Armistead was ever appointed. Here the claim was filed by his widow. Since the respondent did not contest the widow's capacity to file a claim either before the Deputy Commissioner or in the District Court, the objection, even if otherwise meritorious, was made too late. Cf. *McCandless* v. *Furlaud*, 293 U. S. 67. We may nevertheless point out that the widow's asserted incapacity to sue in her own name can be derived only inferentially from the terms of Section 5, and that other Sections of the Act are not in harmony with this inference. Section 12 provides that notice of death may be given "by any person claiming to be entitled to compensation for such death or by a person on his behalf." Section 19(a) provides that "Subject to the provisions of Section 13 a claim for compensation may be filed . . . in accordance with regulations prescribed by the commission", and there is nothing in Section 13 which makes filing by a "personal representative" mandatory. Moreover, administrative practice apparently countenances the filing of claims by widows since the commission has prescribed printed forms bearing the caption: "Claim for Compensation in Death Case by Widow and for Children under the Age of Eighteen." Form US-262.

We reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.